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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

POLICE OFFICER CRAIG BUONORA

Petitioner,

v.

DARRYL T. COGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit's creation of an "extra-judicial conspiracy exception" to the *Briscoe* rule of absolute immunity conflicts with the controlling decision of the United States Supreme Court?

2. Where each of the other seven (7) Circuit Courts of Appeals to consider this issue has rejected the Second Circuit's "extra-judicial conspiracy exception" and has held that witnesses are entitled to absolute immunity under 42 U.S.C. §§ 1981 and 1983 both from their testimony and from any conspiracy to commit perjury, does Rule 10 (a) of the Rules of the United States Supreme Court demonstrate that there are compelling reasons for granting this Writ?

3. Is Petitioner Police Officer Craig Buonora entitled to resolution of the absolute immunity question at the earliest possible stage in litigation?

4. Did the District Court err as a matter of law in determining the Petitioner's motion for summary judgment was premature and that the Respondent's Affidavits complied with Rule 56 (f)? Was the Circuit Court required to consider these issues *de novo*?

List of Parties

DARRYL T. COGGINS, Plaintiff and Respondent;

Police Officer CRAIG BUONORA, Defendant and Petitioner;

COUNTY OF NASSAU, Defendant;

NASSAU COUNTY POLICE DEPARTMENT, Defendant;

Police Officer JAMES VARA, Defendant;

JOHN DOES 1-10, Defendants.

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The Memorandum and Order of the United States District Court for the Eastern District of New York (Joseph F. Bianco, J.) dated June 20, 2008, denying Petitioner's motion for summary judgment is reported at *Coggins v. County of Nassau*, 2008 WL 2522501 (E.D.N.Y.), and reprinted at App. 5a-43a.[1]

The Summary Order of the United States Court of Appeals for the Second Circuit, filed January 28, 2010, is reported at *Coggins v. Buonora*, 362 Fed.Appx. 224, 2010 WL 308990 (2nd Cir. 2010). It is reprinted at App. 1a-4a.

The Order of the Second Circuit denying rehearing and rehearing *en banc*, filed May 19, 2010, is unreported and reprinted at App. 44a-45a.

JURISDICTION

On August 27, 2007, Respondent brought suit against Petitioner and other Defendants in the United States District Court for the Eastern District of New York, alleging that a grand jury indicted him on charges of which he was innocent. Respondent also alleged that the defendants -- including Buonora -- knew he was innocent but nevertheless encouraged his prosecution. More relevantly herein, the complaint further alleged that Officer Buonora committed perjury and that Officers Vara and

[1] References preceded by "App." and followed by "a" are to the pages of the Appendix filed and served herewith.

Buonora conspired to commit perjury during the grand jury proceedings.

On June 20, 2008, the Honorable Joseph F. Bianco, Judge, United States District Court for the Eastern District of New York, denied Petitioner's motion for summary judgment. (App. 5a-43a.) On July 1, 2009, Petitioner appealed the denial of summary judgment to the United States Court of Appeals for the Second Circuit

On January 28, 2010, the Second Circuit issued a Summary Order affirming the District Court's Order in part and dismissing the appeal in part. (App. 1a-4a.)

On May 19, 2010, the Second Circuit issued an Order denying Petitioner's petition for a panel rehearing or for rehearing *en banc*. (App. 44a-45a.)

The jurisdiction of this Court to review the Orders of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

42 U.S.C. § 1981
Equal rights under the law

42 U.S.C. § 1983
Civil action for deprivation of rights

Federal Rules of Civil Procedure
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Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

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Local Rules of the United States District Court for the Southern and Eastern Districts of New York
Civil Rule 56.1

CONCISE STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Respondent Darryl T. Coggins was pulled over by Nassau County Police Officer James Vara on October 9, 2004, at approximately 4:30 A.M. Vara radioed for assistance. Petitioner Police Officer Craig Buonora arrived at approximately 4:40 A.M., after Vara had administered a field sobriety test.

Coggins subsequently fled the scene on foot. Vara and Buonora gave chase. Buonora returned to the scene of the stop where a Floral Park Officer had remained with the two occupants of Coggins' vehicle. A loaded .380 magazine was found next to the vehicle's front passenger door. Vara was unable to catch Coggins. At approximately 5:00 A.M, a Floral Park Officer advised that he had located a loaded 9mm pistol in the vicinity of a fence that Coggins had jumped over while being chased. Buonora was ordered to sign off duty at approximately 7:40 A.M.

Coggins later appeared at the Nassau County, New York, 3rd Precinct with his attorney and surrendered.

Following Coggins' arraignment, the matter was presented to a Grand Jury. Buonora testified falsely before the Grand Jury that he had located the pistol and secured it until he was relieved by a Floral Park Officer. Coggins was indicted. Thereafter, the case was dismissed during the course of evidentiary hearings when Buonora's false testimony came to

light. Buonora pled guilty to, and was convicted of, perjury as a Class A misdemeanor.

Other than assisting at the scene of the arrest, Petitioner's sole involvement in the prosecution of Respondent was his testimony before a Grand Jury on March 17, 2005.

All of the facts related to the arrest and prosecution of Coggins and the fact that Buonora could not have been a "complaining witness" as a matter of law are contained in admissible records maintained by the Nassau County Police Department and were offered on Petitioner's motion to dismiss and for summary judgment.

B. The District Court Proceedings

This case was brought August 27, 2007, by Respondent Darryl T. Coggins against the County of Nassau, the Nassau County Police Department, Police Officer James Vara, in his individual and official capacity, Petitioner Police Officer Craig Buonora, in his individual and official capacity, and John Does 1-10, in their individual and official capacity (collectively, "defendants"), pursuant to 42 U.S.C. §§ 1981 and 1983 as well as New York State tort law.

Respondent's complaint alleged that a grand jury indicted him on charges of which he was innocent. Respondent also alleged therein that the defendants -- including Buonora -- knew he was innocent but nevertheless encouraged his

prosecution. More relevantly herein, the complaint further alleged that Officers Vara and Buonora conspired to commit perjury during the grand jury proceedings.

On or about January 24, 2008, Petitioner moved for summary judgment. Petitioner argued that he was entitled to absolute witness immunity from suit; that four of plaintiff's causes of action were time-barred under New York State law; that Coggins failed to state a claim for negligence under New York State law; and that Coggins failed to plead special damages with sufficient specificity. The motion was denied in part and granted in part.

The District Court denied the motion as to Petitioner's claim of absolute immunity. Petitioner based his claim of absolute immunity on this Court's holding in *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), in which this Court established that all witnesses in judicial proceedings, including police officers, are absolutely immune from civil liability pursuant to the provisions of 42 U.S.C. §§ 1981 and 1983.

The District Court denied Petitioner's claim of absolute liability by relying on *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 254 (2d Cir.1984), *cert. denied* 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), in which the Second Circuit created an exception to the *Briscoe* rule for extra-judicial conspiracies, which was extended to police officer defendants in *Dory v. Ryan*, 25 F.3d 81, 84 (2d Cir.1994). (App. 27a-29a.)

C. The Appellate Court Proceedings

Petitioner appealed the District Court Order, arguing that the Second Circuit's exception for extra-judicial conspiracies was contrary to the holding in *Briscoe* and that the Second Circuit's "extra-judicial conspiracy exception" to absolute immunity was contrary to the holdings of all seven (7) of the other Circuit Courts that addressed the issue.

A three judge panel of the Second Circuit concluding that it was "bound by" *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 254 (2nd Cir.1984), cert. denied 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), and *Dory v. Ryan*, 25 F.3d 81, 84 (2nd Cir.1994), affirmed the lower court's denial of absolute immunity at this stage of the proceeding. (App. 3a.) Additionally, the panel having concluded that "[a]bsent a more developed record of undisputed facts", it was "unable to determine as a matter of law that Buonora was not a complaining witness", and accordingly, the court lacked jurisdiction to consider that issue, requiring dismissal of that portion of the appeal. (App. 3a.)

The Petitioner subsequently petitioned the Second Circuit for a rehearing or rehearing *en banc*. That petition was denied on May 19, 2010. (App. 45a.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

The two prior panel decisions of the United States Court of Appeals for the Second Circuit, *San*

Filippo v. U.S. Trust Co. of N.Y., 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035 (1985) and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994), conflict with the decision of this Court in *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Consideration, therefore, by this Court is compelling and necessary to maintain uniformity of the Court's decisions among the lower courts.

Moreover, this proceeding involves a question of compelling importance in that the Second Circuit's decisions in *San Filippo, supra*, and *Dory, supra*, creating an "extra-judicial conspiracy" exception to *Briscoe*, conflict with the authoritative decisions of each of the other seven (7) Circuit Courts of Appeals that have addressed this issue.

Finally, the panel of the Second Circuit which heard our appeal overlooked or misapprehended our motion to dismiss and summary judgment application and erroneously concluded, that absent a more developed record of undisputed facts, it was unable to determine as a matter of law that Buonora was not a complaining witness. (App. 3a.)

I.

THE SECOND CIRCUIT'S CREATION OF AN "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" TO THE *BRISCOE* RULE OF ABSOLUTE IMMUNITY CONFLICTS WITH THE CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

This lawsuit is an attempt by Coggins to gain financially from his alleged criminal behavior due to the fact that the criminal proceedings against him were dismissed when it was discovered that Police Officer Craig Buonora had testified falsely as to who had discovered a handgun found at the location where Coggins had fled police during the course of a field sobriety test.[2] The complaint is predicated on allegations of civil rights violations, conspiracy and New York State intentional torts.

Police Officer Craig Buonora was not a "complaining witness" and therefore is entitled to absolute immunity from civil damages, as well as from suit. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)(holding that an officer acting as a "complaining witness" is not entitled to the *Briscoe* grant of absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d

[2] Significantly, there is no dispute that whether Buonora located the gun or whether a Floral Park, New York, police officer located the 9mm weapon, it was found at that place and time.

411 (1985)(holding that immunity from suit is more than a mere defense to liability, "it is effectively lost if a case is erroneously permitted to go to trial"); *Pearson v. Callahan*, 555 U.S. ---, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (January 21, 2009)(where this Court restated, "'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*.").

In *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), Justice Stevens, writing the opinion of the Court, specifically noted that at common law all persons who were integral parts of the judicial process were "provided absolute immunity from subsequent damages liability." *Id.* at 335. The *Briscoe* decision dealt specifically with the question of whether a police officer who testified falsely at trial could be held liable for damages under 42 U.S.C. § 1983.

The plaintiff in *Briscoe* argued that the Supreme Court should not grant absolute immunity to a police officer who commits perjury. The Court rejected the argument and refused to create such a narrow exception. "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions... and may be prosecuted subsequently for perjury." *Id.* at 342. The Court recognized that, "[s]ubjecting... police officers to damages liability under § 1983 for their testimony might undermine not only their contribution to the

judicial process but also the effective performance of their other public duties." *Id.* at 345.

In denying Officer Buonora's motion to dismiss pursuant to FRCP 12(b)(6) and his motion for summary judgment pursuant to FRCP 56, the District Court below relied, in part, upon the Second Circuit's holdings in *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035 (1985) and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994). (App. 27a-29a.)

The Second Circuit in *San Filippo* extended the *Briscoe* grant of immunity to witnesses testifying in a Grand Jury proceeding. The Court, however, created an "extra-judicial conspiracy exception" to this absolute immunity. 737 F.2d at 255. Subsequently, in *Dory*, the Court held that the "extra-judicial conspiracy exception" applies to police officer witnesses. 25 F.3d at 84.

In *Dory*, 25 F.3d 81 at 84, a panel of the Second Circuit, relying upon its prior holding in *San Filippo*, held that "*Briscoe v. LaHue, supra*, was expressly limited to immunity for testimony given in judicial proceedings, and its rationale -- to encourage witnesses to come forward with all they know -- does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." In denying the motions below, the District Court determined that both the allegation of an extra-judicial conspiracy in this case along with the plaintiff's inability to conduct discovery of this issue precluded the dismissal of the

action against Officer Buonora. (App. 33a-34a; 17a-18a.)

By allowing for an "extra-judicial conspiracy" exception to absolute immunity afforded to witnesses in judicial proceedings, the Second Circuit has created an exception where none was intended. The reasoning of the Court of Appeals for the Eighth Circuit amply demonstrates that the Second Circuit's decisions creating an "extra-judicial conspiracy" exception to the *Briscoe* rule conflicts with this Court's holding.

> Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

Moses v. Parwatikar, M.D., 813 F.2d 891, 893 (8th Cir. 1987).

Likewise, the Tenth Circuit held that to allow for an "extra-judicial conspiracy" exception would create the same problems that this Court sought to alleviate with its *Briscoe* holding.

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give

> rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same. Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability. *Id.* 460 U.S. at 333, 103 S.Ct. at 1114.

Miller v. Glanz, 948 F.2d 1562, 1571 (10th Cir. 1991) (Emphasis in original.)[3]

[3] In its January 28, 2010, Summary Order, the Second Circuit stated: "In this Circuit, however, absolute immunity does not extend to allegations of conspiracy to present false testimony. *See Dory v. Ryan*, 25 F.3d 81, 84 (2nd Cir.1994); *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 255 (2nd Cir.1984). Although Buonora asks that we overrule these precedents, this panel is bound by those decisions." (App. 3a.) The panel thereby stated that it could not overrule the Court's earlier decisions. Significantly, however, given the opportunity to indicate its agreement with those earlier decisions, it chose not to.

II.

EACH OF THE OTHER SEVEN (7) CIRCUIT COURTS OF APPEALS TO CONSIDER THIS ISSUE HAS REJECTED THE SECOND CIRCUIT'S "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" AND HAS HELD THAT WITNESSES ARE ENTITLED TO ABSOLUTE IMMUNITY UNDER §§ 1981 AND 1983 BOTH FROM THEIR TESTIMONY AND FROM ANY CONSPIRACY TO COMMIT PERJURY AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

With the exception of the Second Circuit, the totality of the Circuit Courts of Appeals that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any conspiracy to commit perjury. *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993); *Alioto v. City of Shively, Kentucky*, 835 F.2d 1173 (6th Cir. 1987); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Moses v. Parwatikar, M.D.*, 813 F.2d 891, 893 (8th Cir. 1987); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir., *en banc*, 1986); *see, too, Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000); *Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991); *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999).

In *Alioto*, the plaintiff had alleged that the defendants had conspired to lie and had lied to a grand jury which subsequently indicted him.

Upholding the District Court's dismissal of plaintiff's 1983 claims based upon the allegations of false testimony and conspiracy to provide false testimony, the Sixth Circuit held that, "[t]he doctrine enunciated in *Briscoe v. LaHue* also shields from liability alleged conspiracies to give false and incomplete testimony in judicial proceedings." *Alioto*, 835 F.2d at 1174 (citation omitted).

When faced with claims of perjured testimony and a conspiracy to commit perjury by an Illinois Police Officer, the Seventh Circuit likewise upheld the District Court's dismissal of the plaintiff's action. Judge Posner, writing the opinion of the Court, held, "[w]itnesses do have absolute immunity, and Wilkins's [plaintiff] attempt to circumvent it by charging them with conspiracy is facile and must fail." *Wilkins v. May*, 872 F.2d 190, 192 (7th Cir. 1989).

The Eighth Circuit, in *Moses v. Parwatikar, M.D.*, 813 F.2d 891 (8th Cir. 1987), was asked to overturn the dismissal of an action brought by a criminal defendant against a Court-appointed psychiatrist who had determined that the defendant was competent to stand trial. The plaintiff had alleged that the doctor had conspired with prosecutors to deny him a fair examination. The Court, having the benefit of reviewing the decisions of three other Circuit Courts of Appeals, including an *en banc* decision from the Ninth Circuit which reversed that Circuit's prior holding that a conspiracy was outside the absolute immunity granted to witnesses, held as follows:

> ...in *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) the Ninth Circuit in its *en banc* procedure reconsidered its earlier position and unanimously held that pleading a conspiracy does not affect absolute immunity. We agree with this sound principle. Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

813 F.2d at 893; (See, also, *Miller*, 948 F.2d at 1570-1571.)

In *Miller*, the Tenth Circuit examined the legislative history of the Civil Rights Act of 1871 and found nothing "suggesting that Congress intended to provide a cause of action for conspiracy to commit perjury in order to obtain a criminal conviction". With respect to vexatious litigation, that Court held:

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same.

> Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability. *Id.*, 460 U.S. at 333, 103 S.Ct. at 1114.

Miller v. Glanz, 948 F.2d 1562, 1571 (10th Cir. 1991) (Emphasis in original).

In the instant action, Officer Buonora committed perjury, was subsequently indicted, and plead guilty to perjury as a misdemeanor. In *Miller*, the Tenth Circuit indicated, "[o]ur holding does not change the fact that such conspirators may be liable *criminally* for conspiring to procure perjured testimony." 948 F.2d at 1571 [emphasis in original].

Several of the Circuit Courts of Appeals have ruled on this issue subsequent to the decisions rendered by the Second Circuit. *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999); *House v. Belford*, 956 F.2d 711 (7th Cir. 1992). Each of these Circuit Courts of Appeals analyzed the holdings of the Second Circuit and found them to run counter to the Supreme Court's decision in *Briscoe*.

When confronted with this issue, the Ninth Circuit had the benefit of being able to review the decisions of six Circuit Courts of Appeals each of which have held that the *Briscoe* grant of absolute immunity extends to allegations of conspiracy to commit perjury as well as the holdings of the Second Circuit in *San Filippo, supra,* and *Dory, supra*. The Ninth Circuit was "persuaded that allowing a

plaintiff to circumvent the *Briscoe* rule by alleging a conspiracy to present false testimony would undermine the purposes served by granting witnesses absolute immunity from damages under § 1983." *Franklin*, 201 F.3d at 1101. The Court stated, "the district court correctly observed, '[a]ny other holding would eviscerate absolute immunity since a witness rarely prepares her testimony on her own'". 201 F.3d at 1101-1102.

Much like the allegations in the instant case, the plaintiff in *Franklin* alleged that the defendant conspired with another witness to offer perjured testimony and ensure that both witnesses told the same story. The Court noted, "[t]he ostensible purpose of this conspiracy was to ensure that one person's testimony did not contradict the other's testimony. But because Terr's alleged conspiratorial behavior is inextricably tied to her testimony, we find that she is immune from damages." 201 F.3d at 1102.

The Eleventh Circuit in *Jones, supra*, concurred with the Seventh Circuit that:

> "'the Second Circuit's effort to differentiate between a conspiracy to present perjured testimony and the act of presenting perjured testimony is a distinction without a difference. A person may not be prosecuted for conspiring to commit an act that he may perform with impunity.' *House*, 956 F.2d at 720".

Jones, 174 F.3d at 1289.

With respect to a similar issue in the same action, the alleged subornation of perjured testimony, the Eleventh Circuit held:

> To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front.

Jones, 174 F.3d at 1289.

Coggins has alleged that Officer Buonora conspired with co-defendant Officer Vara to violate respondent's civil rights. He alleges that (1) Buonora and Vara provided false testimony before the Grand Jury; (2) Vara and Buonora provided mutually consistent testimony; and (3) Buonora plead guilty to perjury. The conspiratorial conduct complained of by Coggins, specifically the conspiracy between Officer Buonora and Officer Vara, is inexorably tied to Officer Buonora's perjured testimony.

Without the "extra-judicial conspiracy exception" to the *Briscoe* grant of absolute immunity, these allegations fail to raise a claim upon which relief may be granted. *Briscoe v. LaHue*, 460 U.S. 325 (1983). The "extra-judicial conspiracy exception" to the *Briscoe* rule created by the Second Circuit in *San Filippo, supra,* and applied to police officer witnesses in *Dory, supra,* creates a back door to the liability of witnesses for their testimony before a Grand Jury that was not envisioned by the Supreme Court in *Briscoe*. The remedy for Officer Buonora's perjury is

not civil liability under 42 U.S.C. § 1983, but rather criminal prosecution for perjury. Such a remedy has already been achieved by Officer Buonora's prosecution and plea of guilty to the charge of perjury.

Of course, this Court's Rule 10 (a) demonstrates that a "compelling reason[ ]" for granting a Petition for a Writ of Certiorari may lie in the existence of the actions by a United States Court of Appeals in "enter[ing] a decision in conflict with the decision of another United States court of appeals on the same important matter". In this case, the "compelling reasons" for such a grant are underscored by the very fact that seven (7) Circuit Courts of Appeals have repudiated the Second Circuit's rationale and reasoning. In other words, the Second Circuit's holdings do not merely conflict with the decisions of "another" Circuit, but every other Circuit to have considered this issue.

III.

POLICE OFFICER CRAIG BUONORA IS ENTITLED TO RESOLUTION OF THE ABSOLUTE IMMUNITY QUESTION AT THE EARLIEST POSSIBLE STAGE IN LITIGATION.

In *Pearson v. Callahan*, 555 US ---, 129 S. Ct. 808, 815, 172 L. Ed. 2d 56 (2009), a unanimous Supreme Court "stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (citing *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) (*per curiam*)). Moreover, Officer Buonora is entitled to absolute immunity not

just as a defense but from suit itself. *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (holding that "immunity from suit... is effectively lost if a case is erroneously permitted to go to trial.").[1]

> [A] ruling on [immunity] should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or *face the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) [emphasis added]. The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

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[1] A denial of immunity, whether it be qualified or absolute, is an appealable order. *Ashcroft v. Iqbal*, 556 U.S. ---, ---, 129 S.Ct. 1937, 1945 (2009) (*citing*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). The Supreme Court in *Iqbal* endorsed the well established notion that denials of immunity fall within a class of prejudgment orders that are reviewable under the collateral-order doctrine because an order rejecting qualified immunity at the motion-to-dismiss stage is a "final decision" under 28 U.S.C. § 1291, which vests courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." *Id.* at 1946.

Saucier v. Katz, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (emphasis in original).

This desire to resolve immunity questions at the earliest possible stage was reiterated even more recently in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009), where this Court reversed the Second Circuit's denial of a motion to dismiss on qualified immunity grounds, reasoning that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, *including 'avoidance of disruptive discovery.' Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)...." *Id.* at 1953 (emphasis added).

The Supreme Court in *Iqbal* noted Judge Cabranes' identification of "the uneasy compromise... between a qualified immunity privilege... and the pleading requirements of Rule 8 (a)...." *Id.* at 1945 (*quoting*, *Iqbal v. Hasty*, 490 F.3d 143, 178 (2nd Cir. 2007)). Judge Cabranes "urged this Court to address [the pleading standard] 'at the earliest opportunity.'" *Ibid.* This Court took up Judge Cabranes' suggestion and, among other things, then rejected "the careful-case-management approach" stating:

> We decline... to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context where we are impelled to give real content to the concept of qualified immunity.... Because

> respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

Id. at 1953-54. This Court dismissed Plaintiff's Complaint *prior to discovery.*[5]

Police Officer Buonora brings a stronger claim for resolution than those who sought only qualified immunity in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), *Pearson v. Callahan*, 555 U.S. ---, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), as well as others who claimed only qualified immunity. Officer Buonora claims absolute immunity from suit based upon claims that arose out of his testimony in a judicial proceeding, which occurred in the course of his official capacity. *Briscoe*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96. *See*, *Shmueli v. The City of New York*, 424 F.3d 231, 236 (2nd Cir. 2005)("As the existence of absolute immunity protects an official not

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[5] *Iqbal* makes clear the District Court erroneously assumed as true many legal conclusions and "threadbare recitals" alleged in the Respondent's complaint when the court considered the Petitioner's 12 (b) (6) motion to dismiss. 556 U.S. ---, 129 S.Ct. at 1950. Yet, the sufficiency of the Respondent's complaint is squarely before this Court because that question is inextricably linked to whether the Respondent is entitled to discovery in light of Petitioner's absolute immunity. As the Court observed in *Iqbal*, "[r]ule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" *Ibid.*

only from liability but also from suit, the validity of the defense should be determined at an early stage.").

Accordingly, Officer Buonora is entitled to this determination at the earliest possible stage, especially where the District Court was presented with ample, admissible evidence, which was undisputed, to determine these issues.

IV.

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE AND THAT THE RESPONDENT'S AFFIDAVITS COMPLIED WITH RULE 56 (f). MOREOVER, THE CIRCUIT COURT WAS REQUIRED TO CONSIDER THESE ISSUES *DE NOVO.*

Summary judgment should be granted when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Concepcion v. U.S.*, 298 F. Supp.2d 351, 355 (Dist. Ct., E.D.N.Y. 2004) (*citing*, FRCP 56 (c); *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *TransSport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2nd Cir. 1992) (*citing*, *Bryant v. Maffucci*, 923 F.2d 979, 982 (2nd Cir. 1991).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Concepcion v. U.S.*, 298 F. Supp.2d 351

(E.D.N.Y. 2004) (*citing*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). But, "[o]nce the moving party has met this burden, the non-moving party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Concepcion v. U.S.*, 298 F.Supp.2d at 355 (*quoting*, FRCP 56 (e)).

On a summary judgment motion, "[a] district court properly considers only evidence that would be admissible at trial." *Atlantic Specialty Insur. Co. v. Gold Coast Developments, Inc.*, 2008 WL 974411 (Dist. Ct., E.D.N.Y 2008) (Bianco, J.) (*citing*, *Nora Bevs., Inc. V. Perrier Group of America, Inc.*, 164 F.3d 736, 746 (2nd Cir. 1998)). Yet, in the instant matter, the District Court only considered "the complaint in this case and Coggin's Rule 56 (f) affidavit [to conclude] that Buonora's motion for summary judgment is premature," and it never considered the admissible evidence, which the Petitioner offered in support of his motion for summary judgment.

The Circuit Court was required to review *de novo* the denial of summary judgment when based on assertions of absolute and/or qualified immunity. *See*, *Walczyk v. Rio*, 496 F.3d 139, 153 (2nd Cir. 2007); *See also*, *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999) (The Second Circuit reviewed *de novo* a grant of summary judgment and affirmed the lower court's grant of summary judgment dismissing the plaintiff's complaint against defendant police officers *before, and in the absence of, discovery*). The Second Circuit in *Roach* held that a plaintiff

> must allege [a conspiracy], with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy. [The plaintiff] has not alleged with any particularity the overt acts engaged in by the police officers. Instead, Thomas's assertions were conclusory and vague, and did not establish the existence of an agreement among the defendants to deprive Thomas of his constitutional rights. Summary judgment was therefore appropriate.

165 F.3d 137, at 147 (citations omitted).

The District Court apparently has misunderstood from the start that the Petitioner's motion for summary judgment was properly before it. There was no request for, or denial of, conversion of a Rule 12 (b) (6) motion to a Rule 56 motion. Rather, the Petitioner sought, and received, the District Court's permission to make the Rule 56 motion for summary judgment to dismiss the Respondent's complaint based upon absolute immunity and other grounds. (App. 6a.)

Further, the Petitioner set before the District Court a prima *facie* case *entitling* the Petitioner to summary judgment based upon absolute immunity from suit arising out of his testimony before the Grand Jury, pursuant to *Briscoe*. The Petitioner also set forth a *prima facie* case establishing as a matter of law that he is not a complaining witness, based upon *Malley*. And, the Respondent did not dispute any of

the factual assertions related to Officer Buonora's claim of absolute witness immunity.

The failure to dispute the facts relevant to the issue of absolute witness immunity are to be considered by the Court to be "admissions" under FRCP 56 (e). "If undisputed material facts are properly placed before the court by the moving party, those facts will be deemed admitted, unless they are properly controverted...." *E.E.O.C. v. Wal-Mart Stores, Inc.*, 2001 WL 1725300 at *3 (Dist. Ct., W.D.N.Y. 2001) (*quoting*, *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2nd Cir. 1992).

The Respondent offered no evidence in opposition to the summary judgment motion but for a deficient FRCP 56 (f) affidavit[6], and the District Court both abused its discretion and erred in finding that the Respondent's Rule 56 (f) affidavit "wholly complie[d] with the standard the Second Circuit has set forth...." (App. 16a.) Specifically, the District Court arbitrarily concluded that four (4) paragraphs from the Respondent's FRCP 56 (f) affidavit created a genuine issue of material fact. (App. 15a-16a; 66a-67a.) Yet, nowhere in the Respondent's FRCP 56 (f) affidavit does he state where, or from whom, he hopes to obtain the necessary information to establish that Officer Buonora was a complaining witness and, thus, subject to the *Malley* exception to absolute immunity from suit or, for that matter, had engaged

[6] In addition to their FRCP 56 (f) affidavit, Coggins also provided the court below with a Local Rules of the United States District Court for the Southern and Eastern Districts of New York, Civil Rule 56.1 Affidavit. For brevity purposes, we are treating the two Affidavits together.

in an extra-judicial conspiracy. (App. 64a-67a.)

FRCP 56 (f) requires "what facts are sought and how they are to be obtained...." The District Court abused its discretion in concluding that summary judgment was premature in light of the erroneous credit given to Respondent's faulty FRCP 56 (f) affidavit. (App. 17a-18a; 65a-68a.)

Petitioner's appeal placed before the Second Circuit anew all the legal (and procedural) questions raised by the Order below, including Petitioner's entitlement to absolute immunity from suit based upon *Briscoe*; that an extra-judicial conspiracy exception is an assault on *Briscoe*; that he is not a complaining witness as a matter of law; that the Respondent failed to meet the test required by Rule 56 (f) to sustain a conspiracy claim or, for that matter, to adequately and sufficiently plead an extra-judicial conspiracy and that the Petitioner is entitled to summary judgment based upon the undisputed, admissible evidence presented to the court below, which the District Court erroneously failed to consider.

In other words, the denial of Petitioner's motion for summary judgment raised before the Circuit Court *de novo* the District Court's entire memorandum and decision. *De novo* review entails "study[ing] the reasoning on which [the District Court's decision] is based." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163 at 168 (2nd Cir. 2001). Since the District Court evaluated the Respondent's Complaint under 12 (b) (6), this "reasoning" was

squarely before the Second Circuit when reviewing the Petitioner's entitlement to absolute immunity *de novo*. *See*, *Walczyk*, 496 F.3d at 153; *Thomas v. Roach*, 165 F.3d at 142.

While summary judgment is generally improper prior to discovery, *Hellstrom, M.D., v. U.S. Dep't of Veteran Affairs*, 201 F.3d 94 (2nd Cir. 2000), the Second Circuit acknowledged that "in rare instances" summary judgment may be granted even without discovery. *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995). Summary judgment is appropriate when there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This is just such a case.

The Respondent was required to come forward with evidence to oppose the Petitioner's motion for summary judgment. The Respondent's only offer of proof was a deficient Rule 56 (f) affidavit, as aforesaid. As a result, the District Court incorrectly[7] concluded that "plaintiff has alleged facts adequate to invoke the extra-judicial conspiracy exception and defeat Buonora's claim of absolute immunity at this stage...." (App. 29a.) Rather, the only actual facts before the trial court to infer a conspiracy was that "(1) Buonora and Vara provided false testimony before the grand jury...; (2) Vara and Buonora provided mutually consistent testimony...; and (3)

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[7] *See*, *Ashcroft v. Iqbal*, 556 US ---, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009) (This Court stated "we are not bound to accept as true a legal conclusion couched as a factual allegation" when considering whether a complaint states a claim to relief).

Buonora, in fact, pleaded guilty to perjury..." (App. 29a.) These findings would purport to hold Officer Buonora liable based upon the mere fact that he testified before a grand jury, which is clearly not what *Briscoe* had in mind.

Finally, despite the fact that there is not a scintilla of evidence, either express or implied, of an actual conspiracy, the District Court concluded "that plaintiff has alleged adequate facts to invoke the extra-judicial conspiracy exception and defeat Buonora's claim of absolute immunity." (App. 29a.) This is also inconsistent with the declaration in *Iqbal* that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" 129 S. Ct. at 1950 (*quoting*, FRCP 8 (a) (2)).

Officer Buonora is entitled to this absolute immunity since he was not a "complaining" witness and his only role in the prosecution of the plaintiff was his false testimony before the Grand Jury considering criminal charges against the plaintiff.

As demonstrated in our preceding points, Coggins alleges that Officer Buonora and others conspired to commit perjury. While the Second Circuit has previously held that an allegation of conspiracy within the plaintiff's complaint is sufficient to deny a motion for dismissal based upon a claim of absolute immunity, each of the Circuit Courts of Appeals (the First, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits) to examine this

issue has ruled to the contrary. Accordingly, this Court should grant the Petition and, upon review, reverse the ruling of the Second Circuit and hold that an allegation of conspiracy is insufficient to defeat Officer Buonora's entitlement to absolute immunity.

Moreover, Officer Buonora is entitled to absolute immunity from respondent's claims as he was not a "complaining witness" in the prosecution of the plaintiff. His only role, other than assisting Officer Vara at the scene, was to testify, albeit falsely, before the Grand Jury that considered criminal charges against the plaintiff. As a witness testifying before a Grand Jury, Officer Buonora is entitled to absolute immunity, both as a defense and from suit, from the plaintiff's claims.

Wherefore, this Petition should be granted pursuant to this Court's Rule 10 (a) since there are "compelling reasons" for doing so grounded in the fact that the Second Circuit's creation of an "extra-judicial conspiracy exception" to *Briscoe v. LaHue* conflicts not only with this Court's holding but with the decisions of all seven (7) Circuit Courts of Appeals which have considered this issue and have rejected the Second Circuit's holdings and rationale, together with such other and further relief as this court deems just and proper.

Respectfully Submitted

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 28, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-3389-cv

DARRYL T. COGGINS,

Plaintiff-Appellee,

- v -

CRAIG BUONORA, Police Officer, in his individual and official capacity,

Defendant-Cross-Claimant-Appellant,

COUNTY OF NASSAU,

Defendant-Cross-Defendant,

NASSAU COUNTY POLICE DEPARTMENT, JAMES VARA, Police Officer, in his individual and official capacity and JOHN DOES 1-10, in their individual and official capacity,

Defendants.

Appendix A

Present: JOHN M. WALKER, JR.,
ROBERT A. KATZMANN,
Circuit Judges,
DENISE COTE,
*District Judge.**

Appeal from the United States District Court for the Eastern District of New York. (Bianco, *J.*).

January 28, 2010, Decided

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED** in part and the judgment of the district court is **AFFIRMED** in part. The case is **REMANDED** for further proceedings.

Defendant-cross-claimant-appellant Craig Buonora appeals from a memorandum and order of the United States District Court for the Eastern District of New York (Bianco, *J.*) dated June 20, 2008, insofar as it denied his motion to dismiss and motion for summary judgment. We assume the parties' familiarity with the underlying facts and procedural history of this case.

Ordinarily, there is no final judgment where the district court denies a motion to dismiss or a motion for

* The Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.

summary judgment. However, where, as here, the appeal of those denials is premised on the defendant's entitlement to absolute immunity, we have jurisdiction "to the extent that the rejection [of the absolute immunity defense] turned on an issue of law." *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005).

Buonora appeals the district court's denial of his motion to dismiss, arguing that he is entitled to absolute immunity from claims arising out of the perjured testimony he provided to the grand jury in the criminal case against plaintiff-appellee Darryl Coggins. In this Circuit, however, absolute immunity does not extend to allegations of conspiracy to present false testimony. *See Dory v. Ryan*, 25 F.3d 81, 84 (2d Cir. 1994); *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 255 (2d Cir. 1984). Although Buonora asks that we overrule these precedents, this panel is bound by those decisions. *See, e.g., United States v. Frias*, 521 F.3d 229, 232 n.3 (2d Cir. 2008). Accordingly, we affirm this aspect of the district court's decision.

Buonora also challenges the district court's decision that it could not determine, based on the record before it, whether Buonora was a complaining witness who would not be entitled to absolute immunity. Absent a more developed record of undisputed facts, we are unable to determine as a matter of law that Buonora was not a complaining witness. Consequently, we lack jurisdiction to consider this issue. *See White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988).

Appendix A

We have considered all of Buonora's remaining arguments and find them to be without merit. Accordingly, insofar as Buonora challenges the district court's decision that it could not determine whether Buonora was a complaining witness, we lack jurisdiction, and the appeal is **DISMISSED**. As to the district court's decision that Buonora is not entitled to absolute immunity because of the extra-judicial conspiracy exception, the judgment of the district court is hereby **AFFIRMED**. We **REMAND** the case for further proceedings.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

s/ Catherine O'Hagan Wolfe

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED JUNE 20, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No 07-CV-3624 (JFB) (AKT)

DARRYL T. COGGINS,

Plaintiff,

VERSUS

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, POLICE OFFICER JAMES VARA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, POLICE OFFICER CRAIG BUONORA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND JOHN DOES 1-10, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants.

MEMORANDUM AND ORDER
June 20, 2008

JOSEPH F. BIANCO, District Judge:

On August 27, 2007, plaintiff Darryl T. Coggins ("plaintiff" or "Coggins") brought the instant action against defendants County of Nassau ("Nassau County"), Nassau County Police Department (the

"Police Department"), Police Officer James Vara, in his individual and official capacity ("Vara"), Police Officer Craig Buonora, in his individual and official capacity ("Buonora"), and John Does 1-10, in their individual and official capacity (collectively, "defendants"), pursuant to 42 U.S.C. §§ 1981 and 1983 and New York State tort law. The complaint alleges that, on March 17, 2005, a grand jury empaneled by the Nassau County District Attorney's Office (the "DA's Office") indicted Coggins on charges of which he was innocent. According to the complaint, the defendants — including Buonora — knew Coggins was innocent and, nevertheless, actively encouraged his prosecution. The complaint further alleges — *inter alia* — that Officers Vara and Buonora conspired to commit perjury during plaintiff's grand jury proceedings. Indeed, the complaint states that, after dismissing all charges against plaintiff, the DA's Office indicted Buonora for perjury. Buonora pleaded guilty.

Buonora now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 or, in the alternative, to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In particular, Buonora argues that (1) he is entitled to absolute witness immunity from suit; (2) four of plaintiff's causes of action are time-barred under New York State law; (3) plaintiff fails to state a claim for negligence under New York State law; and (4) plaintiff has failed to plead special damages with sufficient specificity. For the reasons set forth below, Buonora's motion is granted in part and denied in part. Specifically, the Court dismisses without

prejudice plaintiff's claims for malicious prosecution and abuse of process under New York State law on the grounds that he has failed to plead the requisite special damages with specificity.[1] The motion is denied on all other grounds.

I. Facts

The following facts are taken from the complaint and are not findings of fact by the Court. The Court assumes these facts to be true for the purpose of deciding the motion to dismiss and construes them in the light most favorable to plaintiff, the non-moving party.[2]

A. Coggins's Arrest and Incarceration

The complaint alleges that, on or about October 9, 2004, Coggins was "falsely arrested, falsely seized and falsely detained, deprived of his freedom, unlawfully imprisoned and maliciously prosecuted" by defendants, including Buonora. (Compl. ¶ 42.) Specifically, on or about that date, Coggins was arrested and charged in Nassau County with two counts of Criminal Possession of a Weapon in the Third Degree, in violation of Penal Law

1. As set forth *infra*, however, the Court also grants plaintiff leave to replead these claims within sixty days of this Memorandum and Order.

2. As set forth *infra*, with respect to defendant's request for summary judgment, the Court concludes such application is premature under Rule 56(f) of the Federal Rules of Civil Procedure.

§§ 265.02(3) and (4). (Compl. ¶ 19.) Bail was posted on plaintiff's behalf on October 11, 2004. (Compl. ¶ 20.) Thus, Coggins spent two days in jail. (Compl. ¶ 31.)

According to the complaint, Coggins was innocent of the crimes with which he was charged. (Compl. ¶ 20.) Plaintiff also alleges that defendants knew that Coggins was innocent. (Compl. ¶ 42.)

B. Alleged Role of Buonora in Plaintiff's Arrest and Prosecution

Coggins alleges that defendants, including Buonora, "actively instigated and encouraged the prosecution of plaintiff." (Compl. ¶ 43; *see also* Compl. ¶ 46 ("Upon information and belief, each of the Defendants took an active role in creating and manufacturing the charges against Plaintiff, solely for the purposes of effecting an arrest and conviction, and not to effectuate justice.").) Specifically, the complaint states that Buonora and the other defendants "ordered and directed" plaintiff's arrest and detention (Compl. ¶ 43), and "withheld information which would have exonerated Plaintiff of the criminal charges with which he was charged" (Compl. ¶ 44; *see also* Compl. ¶ 48 ("The Defendants individually and collectively knew at the time of Plaintiff's arrest, and at all times since then, that the evidence they had in connection with the charges brought against Plaintiff were [sic] false. . . .")).

According to the complaint, Buonora and the other defendants "further deprived the plaintiff of his due

process rights; specifically by attempting to prolong the Defendant's unlawful detainment without probable cause, investigation, rule of law and by further denying the plaintiff his Fifth Amendment rights via an attempt to cover up the misconduct of said officers and officials and to prevent plaintiff from being compensated for his wrongful arrest, detainment, and other physical and emotional harm incurred." (Compl. ¶ 32.) Coggins claims that "in furtherance of said conduct, the Defendant officers prolonged the plaintiff's custody by failing to investigate plaintiff's protests that he was not the alleged perpetrator and by conspiring to set bail at an unreasonable amount." (Compl. ¶ 33.) Thus, according to plaintiff, Buonora and the other defendants "acted with the shared purpose of denying plaintiff his rights. . . ." (Compl. ¶ 35.)

The complaint further alleges that Vara and Buonora "negligently and recklessly breached their duty under the United States Constitution to prevent the commission of the civil rights violations perpetrated against" Coggins. (Compl. ¶ 73.)

(1) The Grand Jury

On March 17, 2005, the DA's Office presented Coggins's case to the Grand Jury, which voted to indict plaintiff not only on the charges for which he was arrested, but also for Resisting Arrest in violation of Penal Law § 205.30 (the "indictment"). (Compl. ¶ 22.)

Plaintiff alleges that the indictment "was based primarily on the testimony" of Vara and Buonora. (Compl. ¶ 6.) Specifically, according to the complaint, "Vara falsely testified that while he was chasing [plaintiff], he saw an object fall from Plaintiff as Plaintiff was jumping over a fence. Vara testified that he continued his pursuit of Plaintiff, but later returned to determine that the object that had fallen was a 9-millimeter handgun." (Compl. ¶ 6.) Further, plaintiff alleges that Buonora "falsely testified that he saw a 9-millimeter handgun fall from [plaintiff] as he jumped the fence and that Buonora stayed with the handgun until he was relieved by a Floral Park Officer." (Compl. ¶ 24.)

C. The Floral Park Officer

Coggins alleges that, in June 2005, a Floral Park Officer informed plaintiff's counsel that "the story that [Vara and Buonora] was telling was inaccurate." (Compl. ¶ 25.) Specifically, the Floral Park Officer "informed counsel that he was the Officer who initially found the gun approximately forty minutes after the foot pursuit began. He further indicated that radio transmissions of October 9, 2004 would substantiate his claim." (Compl. ¶ 25.) Coggins alleges that the "Floral Park Officer's version of the events directly contradicted the sworn testimony of Vara and Buonora at the Grand Jury proceeding." (Compl. ¶ 25.)

According to the complaint, Coggins's counsel reviewed the radio transmissions in question and found that they corroborated the claim of the Floral Park

Police Officer. (Compl. ¶ 26.) Counsel referred plaintiff's case to the Special Investigations Division of the DA's Office. (Compl. ¶¶ 4, 26.)

D. Dismissal of Charges Against Coggins and Institution of Perjury Charge Against Buonora

Coggins alleges that fifteen months after his arrest — on August 12, 2005 — "in the face of clear perjury and manufactured evidence, the charges filed against Plaintiff were dismissed on motion of the" DA's Office. (Compl. ¶ 27.) Further, the complaint states that

> [t]hroughout all of these proceedings, Plaintiff never wavered in declaring his innocence and made that fact unequivocally known to Defendants. Significantly, no statements were signed by Plaintiff that can be construed as an admission of guilt. Plaintiff always maintained his innocence and that Vara and Buonora were not being truthful about the underlying facts.

(Compl. ¶ 27.)

The complaint states that Buonora was subsequently indicted for perjury and pleaded guilty to that charge. (Compl. ¶ 28.)

Appendix B

II. Procedural History

Coggins filed his complaint on August 28, 2007. On December 5, 2007, the County, the Police Department, and Vara answered the complaint. On January 24, 2008, Buonora submitted the instant motion. Plaintiff submitted his opposition on February 29, 2008. Buonora submitted his reply on March 10, 2008. By letter dated April 17, 2008, Buonora supplemented his prior submissions with additional case citations.[3] By letter dated April 23, 2008, plaintiff responded to Buonora's supplemental submission. The Court held oral argument on May 30, 2008.

III. Prematurity of Summary Judgment

In his opposition papers, Coggins argues that the Court should review Buonora's motion solely pursuant to Rule 12(b)(6) — and not as a motion for summary judgment pursuant to Rule 56 — on the grounds that discovery has not commenced and, therefore, Buonora's motion for summary judgment is premature. For the reasons set forth below, the Court agrees with plaintiff and, pursuant to Federal Rule of Civil Procedure 56(f), denies Buonora's motion for summary judgment without prejudice to Buonora's renewing it at the close of discovery.

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3. In particular, Buonora submitted citations to cases stating that a district court's denial of immunity at the motion to dismiss stage is subject to interlocutory appeal. The Court is aware of this procedure.

Appendix B

As a threshold matter, the Second Circuit has held that district courts should grant summary judgment only "[i]f *after discovery*, the nonmoving party 'has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.'" *Berger v. United States*, 87 F.3d 60, 65 (2d Cir. 1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)) (alteration in original and emphasis added). In particular, "[t]he nonmoving party must have 'had the opportunity to discover information that is essential to his opposition' to the motion for summary judgment." *Trebor Sportswear Co. v. The Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). Consequently, "[o]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (reversing district court's grant of summary judgment because plaintiff had not been able to conduct discovery).

Indeed, the Supreme Court has explained that in instances where a plaintiff has not had the opportunity to conduct discovery, Rule 56(f) of the Federal Rules of Civil Procedure "allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex*, 477 U.S. at 326; *see also Comm. Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) ("Fed. R. Civ. P. 56(f) provides, as interpreted by court opinions, that when a

party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion.").

Rule 56(f) specifically states:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Further, the Second Circuit has outlined the procedure by which a party may obtain relief under Rule 56(f):

> [A] party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them,

> and (4) why the affiant was unsuccessful in those efforts.'

Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (quoting *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995)).

Here, Coggins submitted an affidavit in compliance with Rule 56(f), specifically explaining that the information he seeks through discovery would create genuine issues of material fact for trial. For instance, Coggins states:

> 9. I believe that through discovery I will be able to obtain the necessary evidence to show that defendants, including Defendant Craig Buonora, were working together to deprive me of my constitutional rights.
>
> 10. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant Craig Buonora was intimately involved in my arrest and prosecution.
>
> 11. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant Craig Buonora not only participated in the plan to deprive me of my rights but that he had the ability to stop the other Defendants from continuing to violate my rights and that he failed to do so.

Appendix B

* * *

> 14. [I] believe that through discovery I will be able to obtain the necessary evidence to show that despite knowing that I was innocent, Defendant Craig Buonora worked with the other Defendants to cover up their lies and had no regard for my life and liberty.

(Coggins Aff. ¶¶ 9-11, 14.) Plaintiff also explained the efforts he had made to obtain the information and the reason why he was unsuccessful. Specifically, Coggins stated: "I was informed by my attorneys that they have made every effort to commence the discovery process, however, they are prevented from properly doing so as it is too early in the case." (Coggins Aff. ¶ 15.)

Coggins's affidavit, therefore, wholly complies with the standard the Second Circuit has set forth for compliance with Rule 56(f); he has particularized the discovery required —the materiality of which, as established *infra*, is beyond dispute — and has explained why he has not obtained this discovery to date. Under similar circumstances — including in cases where, as here, the proposed basis for summary judgment is absolute immunity and the complaint alleges a conspiracy to commit perjury — courts routinely deny summary judgment motions as premature when they are raised prior to plaintiff's being provided with the opportunity for discovery. *See, e.g., Safeco Insurance Co. of Am. v. Discover Property and Casualty Insurance Co.*, No. 05 Civ. 8625, 2008 U.S. Dist. LEXIS 10626, at

*10 (S.D.N.Y. Feb. 6, 2008) ("The parties' pending cross-motions for summary judgment are denied as premature and without prejudice to refiling after discovery closes. . . ."); *Peele v. Mattingly*, No. 06 Civ. 13423, 2007 U.S. Dist. LEXIS 65310, at *4 (S.D.N.Y. Sept. 5, 2007) (holding summary judgment motion in abeyance pursuant to Rule 56(f) where defendant moved on qualified immunity grounds and "facts sought by plaintiffs through deposition discovery promise to fill in material gaps in the chronology of events; illuminate the defendants' knowledge at each phase of the investigation; reveal a more complete picture of the investigative steps taken; and disclose the rationale underlying certain decisions made by the defendants"); *Gabel v. Bd. of Educ. of the Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 336 (S.D.N.Y. 2005) ("Here, there has been no discovery, so the factual record remains to be fleshed out. The District's motion for summary judgment is at best premature."); *Sheff v. City of New York*, No. 03 Civ. 708, 2004 U.S. Dist. LEXIS 4819, at *22 (S.D.N.Y. Mar. 24, 2004) ("While prosecutors have absolute immunity not just for the presentation of testimony, but for all actions related to their advocacy, police officers are not immune for extra judicial actions such as an alleged conspiracy to present false testimony. [Defendant police officer's] motion for summary judgment on this single, remaining claim against him is premature.") (citations and quotation marks omitted).

In sum, after carefully reviewing both the complaint in this case and Coggins's Rule 56(f) affidavit, and in light of plaintiff's inability to conduct any discovery to

date, the Court concludes that Buonora's motion for summary judgment is premature and dismisses it without prejudice to refile at the close of discovery. As set forth below, therefore, the Court reviews Buonora's motion pursuant to the standard of review for motions to dismiss under Rule 12(b)(6).

IV. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff *See Cleveland v. Caplaw Enter.*, 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). The plaintiff must satisfy "a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*" *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (emphasis in original). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). The Court does not, therefore, require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

Further, in reviewing a motion to dismiss, "the district court is normally required to look only to the allegations on the face of the complaint," *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007), as well as

any documents appended thereto. However, the Second Circuit has also established two exceptions to this rule. First, courts may consider a document not appended to the complaint if the document is "incorporated in [the complaint] by reference." *Id.* at 509 (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (emphases in original). Second, courts "'take judicial notice of documents filed in other courts . . . not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings.'" *Crews v. County of Nassau*, No. 06-CV-2610 (JFB), 2007 U.S. Dist. LEXIS 6572, at *5 n.2 (E.D.N.Y. Jan. 30, 2007) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)).

Here, plaintiff did not append any documents to the complaint. Moreover, neither Coggins nor Buonora has asked the Court to take judicial notice of documents appended to their motion papers. Nevertheless, the Court has independently reviewed these documents in order to determine whether they fall into either of the exceptions stated above. After such review, and as set forth below, the Court has determined that the transcripts of Coggins's grand jury proceedings, portions of which were submitted by each party, fall into both of the aforementioned exceptions and, therefore, are properly subject to consideration on the instant motion to dismiss.[4]

4. Specifically, Buonora submitted his own grand jury testimony, and Coggins submitted his own grand jury testimony, as well as Buonora's and Vara's. The remainder of the exhibits (Cont'd)

In particular, with respect to the first exception, courts routinely take judicial notice at the motion to dismiss stage of transcripts — including those of testimony provided in related criminal proceedings — which are incorporated into the complaint by reference. *See, e.g., Jovanovic v. City of New York*, No. 04 Civ. 8437, 2006 U.S. Dist. LEXIS 59165, at *15 (S.D.N.Y. Aug. 17, 2006) (holding, in Section 1983 case involving allegations of false arrest and malicious prosecution, that where complaint "refers to what happened at the arraignment, the grand jury indictment, the trial and the appeal . . . [t]he Court will therefore take judicial notice of these documents and proceedings"); *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694, 699 n.6 (S.D.N.Y. 2005) ("The Court previously granted defendants' request to take judicial notice of the transcripts that the complaint relies upon. The Court, based on the allegations in the complaint, takes judicial notice of what was said at the April 4th,

(Cont'd)

proferred — which largely consist of police reports — do not fall within any of the above-referenced exceptions and, thus, the Court should not consider them at this juncture. *See, e.g., Lyn v. Incorporated Vill. of Hempstead*, No. 03-CV-5041, 2004 U.S. Dist. LEXIS 30545, at *5 (E.D.N.Y. June 25, 2004) (refusing to consider police reports appended to police officers' motion to dismiss case on immunity grounds); *see generally Jarmon v. Pacific Rail Servs.*, No. 06-CV-01372, 2007 U.S. Dist. LEXIS 14393, at *5 (D. Colo. Mar. 1, 2007) (refusing to consider police report at motion to dismiss stage); *Ferranti v. Martin*, No. 3:06cv1694, 2007 U.S. Dist. LEXIS 3981, at *7 n.1 (M.D. Pa. Jan. 19, 2007) (same). In any event, those additional documents would not change the Court's analysis at this stage of the litigation.

23rd, and 28th conferences."). In addition, with respect to the second exception, courts routinely take judicial notice — at the motion to dismiss stage — of transcripts of related judicial proceedings, including criminal proceedings. *See, e.g., Reynolds v. Blumenthal*, No. 3:04cv218, 2006 U.S. Dist. LEXIS 68970, at *9 n.5 (D. Conn. Sept. 26, 2006) ("[I]t has been held that courts may take judicial notice of transcripts from judicial proceedings in related cases."); *Browdy v. Karpe*, No. 3:00-CV-1866, 2004 U.S. Dist. LEXIS 19299, at *5 n.3 (D. Conn. Sept. 20, 2004), *aff'd* 131 Fed. Appx. 751, 2005 U.S. App. LEXIS 9329 (2d Cir. May 16, 2005) [*20] ("The Court takes judicial notice of the judgment mittimus and the transcript of the plea and sentencing in Browdy's state criminal case. . . ."); *UCAR Int'l v. Union Carbide Corp.*, No. 00-CV 1338, 2004 U.S. Dist. LEXIS 914, at *43 (S.D.N.Y. Jan. 26, 2004), *aff'd* 119 Fed. Appx. 300, 2004 U.S. App. LEXIS 24927 (2d Cir. Dec. 2, 2004) (taking judicial notice of plea agreement, sentencing transcript, and arraignment transcript in related criminal case).

Here, the complaint explicitly refers to Vara's and Buonora's grand jury testimony. (*See, e.g.*, Compl. ¶¶ 6, 24.) In addition, the grand jury testimony took place in a criminal proceeding that is not merely related, but central to the complaint in this action. Under these circumstances, the Court finds it appropriate to consider all the grand jury testimony submitted, including Vara's and Buonora's — not for the truth of the facts asserted therein, but solely for the purpose of determining what Vara and Buonora said. *Cf. Global Network Comm'ns,*

Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006) (finding that district court should not have taken judicial notice of testimony where his "testimony as a government witness in an unrelated criminal proceeding was neither mentioned nor relied upon by appellant in drafting its complaint").

V. Discussion

A. Absolute Immunity

Buonora moves to dismiss the complaint in its entirety on the grounds that he is entitled to absolute witness immunity. However, after carefully reviewing the complaint, accepting all of its allegations as true, and drawing all reasonable inferences in favor of plaintiff, the Court declines to rule — at this juncture — that Buonora is entitled to absolute immunity as a matter of law. Specifically, as set forth below, the Court concludes that each of the following reasons suffices independently to defeat Buonora's claim of absolute immunity at the motion to dismiss stage: (1) the Court cannot determine at this juncture, as a matter of law, whether Buonora served as a "complaining witness" in Coggins's prosecution; and (2) the complaint alleges an extra-judicial conspiracy to commit perjury. Thus, the Court denies Buonora's motion to dismiss the complaint on absolute immunity grounds without prejudice to his reasserting such immunity at the summary judgment

stage — after the parties have had the opportunity to conduct discovery.[5]

(1) The "Complaining Witness" Rule

Buonora argues that he is entitled to absolute immunity from suit because he was not a "complaining witness" in Coggins's case according to the Supreme Court's holding in *Briscoe v. LaHue*, 460 U.S. 325 (1983). As set forth below, however — after carefully reviewing the complaint, accepting each of its allegations as true, and drawing all reasonable inferences in plaintiff's favor — the Court cannot determine at this juncture whether Buonora was a complaining witness and, thus, whether he is entitled to absolute immunity on this ground.

"In *Briscoe*, the Supreme Court answered in the negative the question 'whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for

5. The Court is aware that "district courts are encouraged to determine the availability of an absolute immunity defense at the earliest appropriate stage, and preferably before discovery. . . . This is because '[a]n absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.'" *Deronette v. City of New York*, No. 05-CV-5275, 2007 U.S. Dist. LEXIS 21766, at *12 (E.D.N.Y. Mar. 27, 2007) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) and quoting *Imbler*, 424 U.S. at 419 n.13). However, as set forth *infra*, the Court cannot determine whether Buonora's actions were "within the scope of the immunity" at this juncture. Thus, it would be inappropriate to grant such immunity at this time under the particular circumstances of this case.

damages against a police officer for giving perjured testimony at his criminal trial.'" *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993) (quoting *Briscoe*, 460 U.S. at 326). The Second Circuit subsequently extended such "*Briscoe* grants" of immunity for perjurious trial testimony to grand jury testimony. *See San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 254 (2d Cir. 1984), *cert. denied* 470 U.S. 1035 (1985). However, the Second Circuit has also clarified the "subtle yet crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution — complaining witnesses — did not enjoy immunity." *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988). "The question of whether a witness is a complaining witness is a factual one, resting on the determination of whether the witness played such a role in initiating the proceedings that it can be said the witness commenced or continued proceedings against the plaintiff within the meaning of the law of malicious prosecution." *Cipolla v. Rensselaer*, 129 F. Supp. 2d 436, 451 (N.D.N.Y. 2001) (citations and quotation marks omitted); *see also Mejia v. City of New York*, 119 F. Supp. 2d 232, 272 (E.D.N.Y. 2000) ("Whether a witness is a complaining witness a fact-based question that coincides with the determination of whether the witness played such a role in initiating the proceedings that it can be said the witness commenced or continued proceedings against the plaintiff within the meaning of the law of malicious prosecution.").

Here, Buonora argues that his role in Coggins's prosecution was limited to providing grand jury testimony and, therefore, he was not a complaining witness. As set forth below, however, the particular factual circumstances of this case preclude the Court from agreeing with Buonora at this juncture as a matter of law.

Specifically, the Court has carefully reviewed the complaint and finds that it alleges acts by Buonora — separate and apart from perjury — that served to initiate and continue Coggins's prosecution. For instance, the complaint alleges, *inter alia*, that (1) defendants, including Buonora, "actively instigated and encouraged the prosecution of plaintiff" (Compl. ¶ 43); (2) Buonora and the other defendants "ordered and directed" plaintiff's arrest and detention (Compl. ¶ 43), and "withheld information which would have exonerated Plaintiff of the criminal charges with which he was charged" (Compl. ¶ 44); (3) Buonora and the other defendants "further deprived the plaintiff of his due process rights; specifically by attempting to prolong the Defendant's unlawful detainment without probable cause, investigation, rule of law and by further denying the plaintiff his Fifth Amendment rights via an attempt to cover up the misconduct of said officers and officials and to prevent plaintiff from being compensated for his wrongful arrest, detainment, and other physical and emotional harm incurred" (Compl. ¶ 32); (4) "Defendant officers prolonged the plaintiff's custody by failing to investigate plaintiff's protests that he was not the alleged perpetrator and by conspiring to set bail at an

unreasonable amount" (Compl. ¶ 33); and (5) Vara and Buonora "negligently and recklessly breached their duty under the United States Constitution to prevent the commission of the civil rights violations perpetrated against" Coggins. . . ." (Compl. ¶ 73).

In the face of these allegations, the Court cannot determine as a matter of law at this stage in the proceedings whether Buonora served as a complaining witness under *Briscoe*. Indeed, in arguing that he was not a complaining witness, Buonora relies solely on exhibits and information extraneous to the complaint that, as stated *supra*, the Court cannot consider in the context of a motion under Rule 12(b)(6).[6] Therefore, although the Court is sensitive that the availability of absolute immunity should be decided at the earliest possible juncture, the Court declines to rule as a matter of law at this stage, given the allegations of misconduct in the complaint separate from Buonora's perjury, that absolute immunity shields him from any alleged misconduct that took place during Coggins's prosecution. *White*, 855 F.2d at 961 ("Clearly, the plaintiff has alleged a claim of malicious prosecution and appears to have a factual basis that will defeat a claim of immunity

6. The Court notes that, even if such documents submitted by defendant were considered, it would not warrant absolute immunity prior to plaintiff's conducting discovery, including depositions (Buonora, Vara, and the Floral Park Officer), to determine whether the information contained in these police reports and other documents is accurate or whether there is other evidence that may place the accuracy of these reports in dispute.

from liability for this tort. Whether that turns out to be the case cannot be determined at this stage. Since the availability of immunity cannot now be determined as a matter of law, we lack jurisdiction over this interlocutory appeal and are obliged to dismiss so that the matter may proceed in the trial court.").

(2) The Extra-Judicial Conspiracy Exception to Absolute Immunity

As described *supra*, the complaint alleges that Vara and Buonora conspired to commit perjury during Coggins's grand jury proceedings. As set forth below, these allegations of conspiracy provide an additional, independent obstacle to Buonora's assertion of absolute immunity at this juncture. Specifically, the Court finds that the "extra-judicial conspiracy exception" established by the Second Circuit in *San Filippo* prevents Buonora from successfully invoking absolute immunity at the motion to dismiss stage, under the circumstances of this case.

As noted above, in *San-Filippo*, the Second Circuit extended "*Briscoe* grants" of immunity to witnesses testifying before the grand jury. 737 F.2d at 254. However, the Second Circuit also held that *Briscoe* "was expressly limited to immunity for testimony given in judicial proceedings, and its rationale — to encourage witnesses to come forward with all they know — does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255.

Subsequently, in *Dory v. Ryan*, the Second Circuit confirmed that this so-called "extra-judicial conspiracy exception" applied to police officer defendants. 25 F.3d 81, 84 (2d Cir. 1994) ("*San Filippo* did not involve police officers, and has not subsequently been applied to police officers. There is no reason, however, to distinguish police officers from other witnesses with regard to the 'extra-judicial conspiracy exception'. . . ."); *see also Brown v. Adsit*, No. 95-CV-29, 1996 U.S. Dist. LEXIS 16863, at *8 (N.D.N.Y. Nov. 6, 1996) ("Where a plaintiff alleges an extra-judicial conspiracy to present false testimony, police officers are not entitled to absolute immunity."). In *Dory*, therefore, because the complaint alleged not merely perjury, but also contained allegations of conspiracy, the Second Circuit reversed the district court's grant of absolute immunity to the police officer defendant in question. *Id.* at 84.

Here, the Court has carefully examined the complaint in order to determine whether it alleges facts sufficient to invoke the extra-judicial conspiracy exception at this juncture. In conducting this examination, the Court has been mindful of the Second Circuit's admonition in *San Filippo* that "it is imperative for courts to examine with great care any suit charging" a conspiracy to give false testimony and to "dismiss on pre-trial motion those that are clearly baseless." 737 F.2d at 256. However, accepting all allegations in the complaint as true, and drawing all reasonable inferences in plaintiff's favor, the Court finds that the allegations of an extra-judicial conspiracy in Coggins's suit are sufficient to overcome Buonora's claim of

absolute immunity at the motion to dismiss stage. *See Blount v. N.Y. Unified Court Sys.*, No. 03-CV-0023, 2005 U.S. Dist. LEXIS 44013, at *21 (E.D.N.Y. Mar. 17, 2005) ("This Court. . . is bound by Second Circuit precedent, which has expressly rejected absolute witness immunity in the context of extra-judicial conspiracies to give false testimony. Therefore, this is not a case where the Plaintiff is impermissibly circumventing the absolute witness immunity doctrine. Rather, the State Defendants are attempting to circumvent the Second Circuit's holding in *Dory* and *San Filippo*. The Court is not persuaded.") (citations omitted); *Cipolla v. County of Rensselaer*, 129 F. Supp. 2d 436, 451 (N.D.N.Y. 2001) ("But for Plaintiffs' allegations of conspiracy, the absolute immunity analysis would end here. In this Circuit, however, absolute witness immunity does not extend to allegations of conspiracy.").

Specifically, the complaint alleges at various points that Vara and Buonora conspired to violate Coggins's rights. (*See, e.g.*, Compl. ¶¶ 16, 33, 35, 48, 50, 52, 66.) In the particular factual context of this case — including, *inter alia*, Coggins's allegations that (1) Buonora and Vara provided false testimony before the grand jury (Compl. ¶¶ 23-25); (2) Vara and Buonora provided mutually consistent testimony (Compl. ¶¶ 23, 24, 67); and (3) Buonora, in fact, pleaded guilty to perjury (Compl. ¶ 28) — the Court concludes that plaintiff has alleged facts adequate to invoke the extra-judicial conspiracy exception and defeat Buonora's claim of absolute immunity at this stage of the proceedings.

In particular, with respect to these factual allegations, counsel for Buonora did not dispute at oral argument for purposes of this motion (as alleged in the complaint) that (1) Vara and Buonora provided false testimony before the grand jury;[7] and (2) Buonora pleaded guilty to perjury. However, counsel claimed that Vara's and Buonora's grand jury testimony was inconsistent and therefore, could not provide a basis for conspiracy. As set forth below, after carefully reviewing this testimony, the Court wholly disagrees. Specifically, one could reasonably infer from this testimony that Vara and Buonora testified consistently regarding the very issue about which Buonora perjured himself, *i.e.*, the actions he took during the period that Vara was chasing Coggins, especially with respect to Buonora's purported retrieval of the gun in question.

For instance, Buonora testified as follows:

> Q: What, if anything, attracted your attention during the course of the chase?
>
> A: As we got up the side street on Holland, the subject went in an alleyway and went to jump a fence. I heard a noise as he went to jump the fence, which sounded like metal hitting the ground. Officer Vara was in front of me, because he's a little lighter than me, I

7. Counsel for the County, the Police Department, Vara, and John Does 1-10, however, has made clear that the other defendants make no such concession regarding Vara's testimony.

guess. And he kept after the subject. And I looked down to see what it was and found the gun there.

* * *

Q: You said you detected a metal sound hitting concrete?

A: Yes.

Q: Did you immediately look down?

A: Once I got up there, I immediately looked to see what it was.

* * *

Q: When the other officer returned back to the vehicle, where did you go?

A: I stayed with the gun until, I believe, a Floral Park police officer relieved me so I could assist that officer.

* * *

Q: And at any time, did you move the gun while you were, I guess, safeguarding the weapon?

A: You would just safeguard it. You didn't touch it. You wait for crime scene.

(Buonora Testimony at 42, 44, 49.)

Similarly, Vara testified as follows:

Q: What, if anything, attracted your attention during the chase?

A: He came to a fence at the driveway. He jumped over the fence, and as he jumped over the fence, I heard a metal noise hitting concrete, and I looked down, and I saw an object laying on the driveway. My focus was still towards him, towards the defendant. My assisting officer stayed there at the scene, and I had run around, because I thought he was going to go back to the car.

* * *

Q: After the chase was suspended, you said you returned to the driveway and actually observed now the gun on the driveway floor?

A: Yes.

Q: And was Officer Buonora there at that time?

A: Yes, he was.

(Vara Testimony at 20-21, 29.) Taken in the context of this case as a whole — including the complaint's allegations that (1) Coggins never possessed a gun and, thus, no such gun fell from him during the chase (Compl. ¶¶ 67-68); and (2) the Floral Park Officer, and not Buonora, "initially found the gun approximately forty minutes after the foot pursuit began" (Compl. ¶ 25) — the Court concludes that Coggins has alleged facts sufficient to invoke the extra-judicial conspiracy exception to immunity at this juncture. *See, e.g., Pearl v. City of Long Beach*, 296 F.3d 76, 87 (2d Cir. 2002), *cert. denied* 538 U.S. 922 (2003) (explaining that "it was a reasonable inference that the officers had agreed to present their allegedly false" testimony where officers provided identical testimony); *cf. Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (affirming district court's grant of summary judgment to police officer defendants on conspiracy claim where district court had noted that "it would seem more conspiratorial if all of the defendants' stories matched up in the details") (quotation marks omitted).[8]

8. The Court notes that in response to the Court's inquiry at oral argument, counsel for Buonora was unable to cite any case where a court granted absolute immunity to a police officer at the motion to dismiss stage — thereby refusing to permit the parties to conduct any discovery — where the plaintiff alleged an extra-judicial conspiracy among officers to commit perjury and one of the police officers actually pleaded guilty to perjury. Instead, counsel repeatedly cited cases such as *Mitchell*

(Cont'd)

In sum, after carefully reviewing the complaint, assuming all of its allegations are true, and drawing all reasonable inferences in plaintiff's favor, the Court concludes that each of the following reasons is independently sufficient to defeat Buonora's claim of absolute immunity at the motion to dismiss stage: (1) the Court cannot determine at this juncture as a matter of law whether Buonora served as a "complaining witness" in Coggins's prosecution; and (2) the complaint alleges an extra judicial conspiracy to commit perjury.[9]

(Cont'd)

v. Forsyth, where the Supreme Court emphasized that courts should resolve questions of immunity as early in judicial proceedings as possible. *See* 472 U.S. 511, 526 (1985). As stated *supra*, the Court is aware of the holding in *Mitchell* and is sensitive to its dictate. The Court has concluded, however, in light of the particular factual circumstances of this case, that dismissing Coggins's case on immunity grounds at this juncture is inappropriate under Second Circuit law. Again, the Court reaches this conclusion without prejudice to Buonora arguing that he is entitled to immunity at the summary judgment stage, after the parties have had the opportunity to conduct discovery.

9. Buonora does not argue that he is entitled, in the alternative, to qualified immunity. Nevertheless, the Court has considered whether Buonora is entitled to qualified immunity and, for the reasons set forth below, has determined that he is not entitled to such immunity at this juncture. The Second Circuit has held that

> [a] defendant is entitled to qualified immunity on a motion to dismiss if the allegations of the complaint fail to state a claim of violation of clearly established

(Cont'd)

Appendix B

B. Statute of Limitations

Buonora moves to dismiss Coggins's causes of action under New York State law for Fraudulent Misrepresentation (Count Four), Abuse of Process and Malicious Prosecution (Count Five), False Arrest and False Imprisonment (Count Six), and Intentional Infliction of Emotional Distress (Count Eight) on statute of limitations grounds. For the reasons set forth below, and under the particular circumstances of this case, the Court cannot conclude at this juncture that these causes

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(Cont'd)

> law. Qualified immunity shields officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is clearly established when the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . The unlawfulness must be apparent. Even where a right is clearly established, an official is entitled to qualified immunity nevertheless if it was objectively reasonable for the public official to believe that his acts did not violate that right[ ].

Connell v. Signoracci, 153 F.3d 74, 80 (2d Cir. 1998) (citations and quotation marks omitted). It is beyond cavil that, *inter alia*, conspiring to commit perjury before the grand jury violates a clearly established right of which Buonora should have known, and that no public official would think it was objectively reasonable to violate that right. Thus, at this stage of the proceedings, Buonora could not sustain a claim of qualified immunity under the circumstances in this case.

of action are time-barred as a matter of law. As with the immunity issue, therefore, Buonora may renew his statute of limitations defense at the summary judgment stage, after the parties have had the opportunity to conduct discovery.

In particular, Buonora argues that all of the above-referenced claims are governed by New York Civil Practice Law and Rules § 215(3), which establishes a one-year statute of limitations for intentional torts. *See Green v. City of New York*, 465 F.3d 65, 86 (2d Cir. 2006) ("New York Civil Practice Law and Rules § 215(3) provides a one-year statute of limitations for intentional torts."); *see also Brewton v. City of New York*, No. 05-CV-3574, 550 F. Supp. 2d 355, 2008 U.S. Dist. LEXIS 36455, at 38 n.13 (E.D.N.Y. May 5, 2008) ("New York Civil Practice Law and Rules § 215(3) fixes a one-year statute of limitations for intentional torts.")[10]

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10. As a threshold matter, the Court notes that fraudulent misrepresentation claims are not governed by Section 215(3). Instead, "[i]ntentional misrepresentation claims are governed by the six-year statute of limitations for actual frauds." *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 51 F. Supp. 2d 457, 470 (S.D.N.Y. 1999). Specifically, "a party must commence an action for actual fraud within either six years of the commission of the fraud or two years from the time that the party discovered or should have discovered the fraud with reasonable diligence, whichever is longer." *Id.* (citing CPLR §§ 203(g), 213(8)); *see also Raul v. Am. Stock Exchange, Inc.*, No. 95 Civ. 3154, 1996 U.S. Dist. LEXIS 5914, at *25-*26 (applying six-year statute of limitations — as well as two-year exception for discovery of the fraud — to fraudulent misrepresentation claim).

Plaintiff, on the contrary, argues that the appropriate limitations period under the circumstances of this case is set forth in CPLR § 213-b, which establishes a seven-year statute of limitations for suits by crime victims. Specifically, Section 213-b provides that

> an action by a crime victim, or the representative of a crime victim . . . may be commenced to recover damages from a defendant . . . convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime.

NY CPLR § 213-b. Essentially, Coggins argues that Section 213-b applies to his lawsuit because he was the victim of Buonora's crime of perjury. In response, Buonora claims that Section 213-b is inapplicable because his victim was the justice system — not Coggins. For the reasons set forth below, the Court cannot determine at this juncture — prior to the parties' having the opportunity to conduct any discovery — whether Section 213-b is applicable.

The New York State courts have affirmed that "CPLR 213-b being a procedural statute is to be liberally construed. Its purpose, to extend the time a crime victim has to pursue a defendant responsible for the crime, is designed to provide a meaningful remedy to the victim and the statute should, therefore, be read expansively." *Cavanaugh v. Watanabe*, 10 Misc. 3d 1043, 806 N.Y.S.2d

848, 849 (N.Y. Sup. Ct. Dec. 19, 2005) (slip op.). As such, the statute "does not specifically define 'crime,' does not limit the crimes to which it is applicable, and does not limit the term 'crime victim'. . . . Since [the legislature] did not do so, it follows that the terms 'crime' and 'crime victim' were not intended to be restricted as they are in the Executive Law." *Elkin v. Cassarino*, 248 A.D.2d 35, 680 N.Y.S.2d 601, 603 (App. Div. 1998). Thus, courts have applied Section 213-b to a range of crimes. *See, e.g., Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 153 n.6 (2d Cir. 1999) (noting that district court had applied Section 213-b to claim for breach of fiduciary duty, although reversing district court in part on other grounds). For these reasons, "[r]esearch discloses that the benefit of CPLR 213-b has been denied only in those cases where there was no causal connection between the crime for which defendant was convicted and the damages sought." *Cavanaugh*, 806 N.Y.S.2d at 849; *see also Elkin*, 680 N.Y.S.2d at 604 (noting that plaintiff must demonstrate that his injury "resulted from [defendant's] crime" in order to invoke Section 213-b).

Here, the complaint reflects that the DA's Office continued to prosecute Coggins — for crimes of which he was allegedly innocent — for nearly five months after Buonora committed perjury. (Compl. ¶ 4.) Further, the complaint states that as a "direct result" of defendants' alleged misconduct, including Buonora's perjury, Coggins "has suffered and continues to suffer loss of income, loss of other employment benefits, loss of career opportunities, and has suffered and continues to suffer

repeated, severe and permanent psychological, emotional and physical trauma and damage, including distress, humiliation, embarrassment, great financial expense and damage to his reputation. . . ." (Compl. ¶ 38.) In light of the New York State courts' expansive interpretation of Section 213-b — and assuming all of the allegations in the complaint are true, and drawing all reasonable inferences in favor of plaintiff — the Court declines to determine as a matter of law that no causal connection exists between Buonora's crime of perjury and the physical, emotional, and financial damage Coggins allegedly suffered. The Court finds, therefore, that discovery is warranted in order to determine the applicability of Section 213-b. Thus, the Court denies Buonora's motion to dismiss these causes of action on the grounds that they are time-barred, without prejudice to Buonora's renewing the statute of limitations defense at the summary judgment stage, after the parties have had the opportunity to conduct discovery on the factual issues that relate to the application of Section 213-b.

C. Negligence

For the reasons set forth below, the Court rejects Buonora's assertion that the Court should dismiss Coggins's cause of action for negligence under New York State law.

In particular, Buonora objects to Coggins's negligence claim on the grounds that plaintiff also brought causes of action under Sections 1981 and 1983,

which involve intentional misconduct. (Buonora Reply at 10 ("Not only has the plaintiff offered no theory as to how Officer Buonora might have been 'negligent,' plaintiff has argued strenuously as to how Officer Buonora's intentional acts damaged plaintiff As a matter of law, Officer Buonora can not [sic] be found to be negligent.").) However, Federal Rule of Civil Procedure 8, which sets forth the legal standard for pleadings, explicitly states that "[a] party may state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). Thus, "[w]hile it is true that the same factual predicate cannot support both a finding of liability based on reckless or intentional conduct and a finding of liability based on negligent conduct, plaintiff is free to plead alternate theories of liability, even if those theories are inconsistent." *Brown v. City of New York*, No. 02-CV-6337, 2005 U.S. Dist. LEXIS 5512, at *12-*13 (E.D.N.Y. Mar. 30, 2005) (citing Rule 8 and *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 55 n.3 (2d Cir. 2004)). Because Coggins's alternate theories of liability comply fully with Rule 8, the Court declines to dismiss plaintiff's cause of action for negligence on the grounds that he also brought causes of action pursuant to Sections 1981 and 1983.

In addition, the Court rejects Buonora's related assertion that the Court should dismiss Coggins's cause of action for negligence on the grounds that Buonora's sole involvement in Coggins's prosecution consisted of Buonora's perjury — a crime of intent. As set forth in detail *supra*, the complaint contains various allegations against Buonora in addition to perjury. For instance, the

complaint states, *inter alia*, that he "fail[ed] to investigate plaintiff's protests that he was not the alleged perpetrator" (Compl. ¶ 33), and "withheld information which would have exonerated Plaintiff of the criminal charges with which he was charged" (Compl. ¶ 44). Under these circumstances, the Court declines to conclude as a matter of law that Coggins's cause of action for negligence is insufficient to withstand a motion to dismiss.

In sum, the Court denies Buonora's motion to dismiss plaintiff's cause of action for negligence under New York State law.[11]

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11. Buonora also moves to dismiss Coggins's cause of action for negligence — as well as his causes of action for malicious prosecution, abuse of process, and for violations of Sections 1981 and 1983 — on the grounds that Coggins has failed to plead special damages with specificity. As set forth below, the Court agrees with Buonora in part. Although plaintiff need not plead special damages in order to state a claim for negligence and for violations of Sections 1981 and 1983, *see, e.g.*, *Bisson v. United Nations*, No. 06 Civ. 6352, 2008 U.S. Dist. LEXIS 9723, at *4-*5 (S.D.N.Y. Feb. 11, 2008) (analyzing negligence claim where plaintiff claimed general damages); *Day v. Morgenthau*, 909 F.2d 75, 77 (2d Cir. 1990) (explaining that special damages need not be alleged in Section 1983 case); *Shelter Inc. Realty v. City of New York*, No. CV-01-7015, 2007 U.S. Dist. LEXIS 305, at *38 (E.D.N.Y. Jan. 4, 2007) (explaining that Section 1983 provides "the exclusive damages remedy for violations of § 1981 when the claim is against state actors"), the Court agrees with Buonora that "special damages are a necessary element" of claims for malicious prosecution and

(Cont'd)

VI. Conclusion

For the foregoing reasons, the Court determines, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that Buonora's motion for summary judgment is premature at this juncture. The Court thus denies this motion without prejudice to Buonora's renewing it after the completion of discovery. Further, the Court grants in part and denies in part Buonora's

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(Cont'd)

abuse of process. *Hawkins v. City of New York*, No. 99 Civ. 11704, 2005 U.S. Dist. LEXIS 15898, at *53 (S.D.N.Y. Aug. 8, 2005); *see also Brown v. Brown*, 343 F. Supp. 2d 195, 198 (E.D.N.Y. 2004) (explaining that plaintiff must plead special damages for abuse of process and malicious prosecution claims). The Court also agrees that "round numbers . . . may not qualify as special damages." *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1118 (S.D.N.Y. 1992) (finding "plaintiff's allegations of special damages are still too generalized to survive dismissal" where plaintiff "'has not submitted the itemized proof of damages the law requires. . . .'"); *see also Daniels v. Alvarado*, No. 03-C V-5832, 2004 U.S. Dist. LEXIS 3893, at *19 (E.D.N.Y. Mar. 12, 2004) ("Round numbers and general allegations of dollar amounts are insufficient as special damages.") (citation and quotation marks omitted). Here, because plaintiff has provided round dollar figures in conjunction with his causes of action for abuse of process and malicious prosecution, he has failed to state these claims with sufficient specificity. The Court, therefore, dismisses these claims without prejudice. However, because Coggins may be capable of remedying this pleading failure, the Court grants plaintiff leave to replead. Specifically, plaintiff shall submit any such amended pleading within sixty days of this Memorandum and Order. Failure to submit an amended pleading will result in dismissal of these causes of action with prejudice.

motion to dismiss the complaint pursuant to Rule 12(b)(6). Specifically, the Court dismisses without prejudice Coggins's claims for abuse of process and malicious prosecution under New York State law on the grounds that he has failed to plead the requisite special damages with sufficient specificity. The Court, however, grants plaintiff leave to replead these causes of action and affords plaintiff sixty days from the date of this Memorandum and Order to submit an amended complaint. Failure to do so shall result in dismissal of these causes of action with prejudice. Buonora's motion to dismiss the complaint is denied on all other grounds.

The parties shall begin discovery under the direction of Magistrate Judge Tomlinson. Although Buonora is concerned that discovery will be a fishing expedition by plaintiff, the Court is confident that Magistrate Judge Tomlinson will monitor the discovery process to ensure that the nature and scope of discovery is consistent with the factual issues relevant to this case.

SO ORDERED.

JOSEPH F. BIANCO
United States District Judge

Dated: June 20, 2008
Central Islip, NY

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, FOR REHEARING EN BANC FILED MAY 19, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-3389-cv

DARRYL T. COGGINS,

Plaintiff-Appellee,

- v -

CRAIG BUONORA, Police Officer, in his individual and official capacity,

Defendant-Cross-Claimant-Appellant,

COUNTY OF NASSAU,

Defendant-Cross-Defendant,

NASSAU COUNTY POLICE DEPARTMENT, JAMES VARA, Police Officer, in his individual and official capacity and JOHN DOES 1-10, in their individual and official capacity,

Defendants.

Appendix C

Craig Buonora having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

s/ Catherine O'Hagan Wolfe

APPENDIX D — RELEVANT STATUTES AND RULES

42 U.S.C.A. § 1981
Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Appendix D

42 U.S.C.A. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure
Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;

- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Appendix D

Federal Rules of Civil Procedure
Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any

redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Appendix D

Federal Rules of Civil Procedure
Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) *Establishing Liability.* An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be

admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Appendix D

LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

Effective April 15, 1997

Includes Amendments through May 11, 2010

Local Civil Rule 56.1 Statements of Material Facts on Motion for Summary Judgment

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, ***in numbered paragraphs***, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include ***a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing*** a separate, short and concise statement of ***additional*** material facts as to which it is contended that there exists a genuine issue to be tried.

(c) ***Each numbered paragraph in the statement of*** material facts set forth in the statement required to

be served by the moving party will be deemed to be admitted ***for purposes of the motion*** unless ***specifically*** controverted by ***a correspondingly numbered paragraph in*** the statement required to be served by the opposing party.

(d) Each statement ***by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact***, must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

[Adopted March 25, 2004]

APPENDIX E — AFFIDAVIT OF DARRYL T. COGGINS DATED FEBRUARY 29, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET NO.
07-CV-3624
(JFB)(AKT)

DARRYL T. COGGINS,

Plaintiff,

- against -

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, POLICE OFFICER JAMES VARA, in his individual and official capacity, and POLICE OFFICER CRAIG BUONORA, in his individual and official capacity, and JOHN DOES "1-10", in their individual and official capacity,

Defendants.

AFFIDAVIT

I, DARRYL T. COGGINS, Plaintiff in this action, affirms the following statements to be true pursuant to the penalties of perjury:

Appendix E

1. I am familiar with all of the facts and proceedings herein and respectfully submit this affidavit in support of Plaintiff's Opposition to Defendant CRAIG BUONORA's motion to dismiss and for summary judgment.

2. The facts, mentioned herein, will provide the court with the necessary information to deny Defendant's motion in its entirety.

3. As I was driving on Jericho Turnpike on October 9, 2004, I was pulled over by a Nassau County Police Officer for no reason at all.

4. On October 9, 2004, again for no reason at all, I was arrested and charged under Docket No.: 2004NA021116, with violating Penal Law § 265.02(3), Criminal Possession of a Weapon in the Third Degree, a Class D felony and Penal Law § 265.02(4), Criminal Possession of a Weapon in the Third Degree, a Class D Felony. A conviction under Penal Law §§ 265.02(3) and/or 265.02 (4) carries with it a potential penalty of two (2) years to seven (7) years incarceration.

5. The charges filed against me were dismissed on motion of the District Attorney on August 12, 2005.

6. In 2007, I retained the Law Offices of Frederick K. Brewington to commence this civil action against the above-mentioned defendants.

7. The action was commenced on August 287, [sic] 2007. My attorney has informed me that there has been no discovery in this case to date. In particular, there have been no discovery demands served and there have been no depositions.

8. I believe that once we start to move forward with discovery in this case, the truth will come about the defendants in this matter.

9. I believe that through discovery I will be able to obtain the necessary evidence to show that defendants, including Defendant CRAIG BUONORA, were working together to deprive me of my constitutional rights.

10. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant CRAIG BUONORA was intimately involved in my arrest and prosecution.

11. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant CRAIG BUONORA not only participated in the plan to deprive me of my rights but that he had the ability to stop the other Defendants from continuing to violate my rights and he failed to do so.

12. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant CRAIG BUONORA deprived me of my rights under Federal and State law due to my race and color.

13. I believe that through discovery I will be able to obtain the necessary evidence to show that Defendant CRAIG BUONORA knowingly and intentionally violated the law when he testified falsely at the Grand Jury proceeding.

14. believe [sic] that through discovery I will be able to obtain the necessary evidence to show that despite knowing that I was innocent, Defendant CRAIG BUONORA worked with the other Defendants to cover up their lies and had no regard for my life and liberty.

15. I was informed by my attorneys that they have made every effort to commence the discovery process, however, they are prevented from properly doing so as it is too early in this case.

Dated: February 29, 2008
Hempstead, NY

s/ Darryl T. Coggins
DARRYL T. COGGINS

APPENDIX F — PLAINTIFF'S STATEMENT OF DISPUTED FACTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO LOCAL RULE 56.1 AND COUNTER-STATEMENT OF FACTS DATED FEBRUARY 29, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET NO. 07-CV-3624
(JFB)(AKT)

DARRYL T. COGGINS,

Plaintiff,

- against -

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, POLICE OFFICER JAMES VARA, in his individual and official capacity, and POLICE OFFICER CRAIG BUONORA, in his individual and official capacity, and JOHN DOES "1-10", in their individual and official capacity,

Defendants.

Appendix F

PLAINTIFF'S STATEMENT OF DISPUTED FACTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO LOCAL RULE 56.1 AND COUNTER-STATEMENT OF FACTS

Pursuant to Local Rule 56.1 for the Eastern District of New York, Plaintiff DARRYL T. COGGINS, submits this Statement of Disputed Material Facts in Opposition to Defendant CRAIG BUONORA's (hereinafter "DEFENDANT BUONORA") Motion for Summary Judgment. Further, Plaintiff respectfully avers that, in addition to those assertions made by the Defendant which are disputed here, this document is provided pursuant to Local Civil Rule 56.1, as a counter-statement of facts in support of Plaintiff's contentions that genuine facts are in dispute. The facts and contentions listed below in Plaintiff's Counter Statement are not all-inclusive of each and every disputed issue, but are provided to demonstrate the level and complexity of the disputed issues which permeate this case. Further, references provided in support of each of the issues raised are not all-inclusive, and are offered to comply with the Local Rule. Further, Plaintiff's object to Defendant's improper misstatement of facts so as to lead to deceptive and inaccurate conclusions and Plaintiff does not concur with the subject titles adopted by Defendant and only utilize them for purposes of recognition and consistency.

Finally, the facts and contentions listed below are derived from Plaintiff's Complaint, Defendant's Motion papers and Plaintiff's independent recollection. Plaintiff has no documentation attached as exhibits as no

discovery has been conducted in this matter. Therefore, Plaintiff is not in possession of any documents that would refute Defendant's alleged statements of fact.

DISPUTED FACTS

1. Not disputed.

2. Not disputed.

3. Not disputed.

4. Disputed. It is disputed that any caliber magazine allegedly found by Police Officers contained Plaintiff's fingerprints. (Cartright Decl. Exh. A)

5. Not disputed.

6. Disputed. It is disputed that Plaintiff was ever in the possession of any pistol. (GJ Trans P. 69:4-9).

7. Plaintiff cannot dispute or concur with the allegations as set forth in this paragraph.

8. Not disputed.

9. Not disputed.

10. Not disputed.

11. Not disputed.

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12. Not disputed.

13. Not disputed.

14. Not disputed.

15. Not disputed.

16. Not disputed.

17. Not disputed.

18. Not disputed.

19. Not disputed.

20. Not disputed.

21. Not disputed.

22. Not disputed.

23. Not disputed.

Appendix F

PLAINTIFF'S COUNTER STATEMENT OF FACTS

1. On or about October 9, 2004, Plaintiff was arrested and charged under Docket No. 2004NA021116, with violating Penal Law § 265.02(3), Criminal Possession of a Weapon in the Third Degree, a Class D felony and Penal Law § 265.02(4), Criminal Possession of a Weapon in the Third Degree, a Class D Felony. (Cartright Decl. Exh. G) A conviction under Penal Law §§ 265.02(3) and/or 265.02 (4) carries with it a potential penalty of two (2) years to seven (7) years incarceration. Penal Law § 70.02(c).

2. On March 17, 2005, this matter was presented to the Grand Jury by the Nassau County District Attorney's Office (hereinafter referred to as the "District Attorney"). (Cartright Decl. Exh. B)

3. Plaintiff Coggins testified at this Grand Jury Proceeding on March 17, 2005. (GJ Trans. P. 50:8-77:13).

4. During his testimony, Plaintiff indicated that on October 9, 2004, he was pulled over by the Police while driving down Jericho Turnpike and was asked for his driver's license. (GJ Trans. P. 59:6-12; P. 63:18-23)

5. Plaintiff also testified that despite his numerous requests, the Police Officer would not indicate why he had been pulled over. (GJ Trans. P.59:13-21)

6. Plaintiff testified that he was given some form of standard field sobriety test by an Officer and at some

point in time Defendant BUONORA arrived on the scene. Op." (GJ Trans. P. 64:11-21; See also, Defendant's Exhibit "G", Page 38, Lines 5-9 and 21-25).

7. Plaintiff testified that one of the Police Officers grabbed Plaintiff and threatened to do more than grab him, so Plaintiff began to run because he was scared. (GJ Trans. P. 60:8-13, Page 73:3-5).

8. Defendant BUONORA testified that while on the scene, he participated in the chase of Plaintiff. (See Defendant's Exhibit "G", Page 38).

9. Plaintiff testified that he originally had intentions to stop running until he heard a Police Officer yell, "Shoot him in the back." (GJ Trans. P. 60:20; P. 74:9-10).

10. Defendant BUONORA testified that he yelled out to Plaintiff. (See Defendant's Exhibit "G", Page 48, Line 20-22).

11. Plaintiff testified that he jumped over a fence and took a cab home. (GJ Trans. P. 60:24-25; P. 68:17-19).

12. Plaintiff did not have a pistol on his person at that time nor did a pistol drop from his waistband. (GJ Trans. P. 68:20-25; P. 69:1-6).

13. Prior to the District Attorney presenting the criminal matter to the Grand Jury, counsel for Plaintiff requested, by way of formal demand, that the District

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Attorney request that the Grand Jury consider the charges of perjury, making an apparently sworn false statement, making a punishable false written statement, harassment and aggravated harassment, and requesting that certain eyewitnesses be presented before the Grand Jury. (Cartright Decl. Exh. E).

14. The District Attorney failed to comply with the Plaintiff's requests and the Grand Jury rendered a True Bill, voting to indict Plaintiff on violating Penal Law § 265.02(3), Criminal Possession of a Weapon in the third degree, Penal Law § 265.02(4), Criminal Possession of a Weapon in the third degree; and Penal Law § 205.30, Resisting Arrest; under Indictment No. 663N-2005. (Cartright Decl. Exh. D).

15. Defendant VARA falsely testified that while he was chasing Plaintiff, DARRYL T. COGGINS, he saw an object fall from Plaintiff as Plaintiff was jumping over a fence. VARA testified that he continued his pursuit of Plaintiff, but later returned to determine that the object that had fallen was a 9-millimeter handgun. (GJ Trans. P. 20-22).

16. Police Officer BUONORA falsely testified that he saw a 9-millimeter handgun fall from Plaintiff, DARRYL T. COGGINS, as he jumped the fence and that BUONORA stayed with the handgun until he was relieved by a Floral Park Officer. (GJ Trans P. 49:10-14).

17. As Plaintiff jumped over a fence, no pistol fell from Plaintiff's waistband. (GJ Trans. P.68:17-24).

18. Plaintiff did not have a pistol in his possession (GJ Trans. P. 68:25-P.69-2-9).

19. In or around July 2005, a Floral Park Officer informed this office that the story that Police Officers VARA and BUONORA told Grand Jury was inaccurate. The Floral Park Officer informed Plaintiff's counselor that he was the Officer who initially found the gun approximately forty minutes after the foot pursuit began and that radio transmissions of October 9, 2004 would substantiate his claim. The Floral Park Officer's version of the events directly contradicted the sworn testimony of VARA and BUONORA at the Grand Jury proceeding. (See Plaintiff's Complaint, ¶25).

20. Counsel reviewed the Floral Park and Nassau County Police Department's radio transmissions and found that they substantiated the claim of the Floral Park Police Officer. (Cartright Decl. Exh. E) The case was referred to the Special Investigations Division of the Office of the District Attorney for further investigation. (See Plaintiff's Complaint, ¶26).

19. [sic] The charges filed against Plaintiff were dismissed on motion of the District Attorney on August 12, 2005. (Cartright Decl. Exh. F).

20. [sic] Police Officer BUONORA was subsequently indicted and pleaded guilty to Perjury in the Third Degree, a Class "A" Misdemeanor. (See Plaintiff's Complaint, ¶28; Defendant BUONORA's Statement of Facts, ¶21, Defendant BUONORA's Affidavit, ¶12).

Appendix F

Dated: Hempstead, New York
February 29, 2008

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 6 - 2010
OFFICE OF THE CLERK

No. 10-237

In the Supreme Court of the United States

CRAIG BUONORA,

Petitioner,

v.

DARRYL T. COGGINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner is a policeman who conspired to falsely arrest the respondent, fabricate evidence against him, and testify perjuriously before a grand jury. Now confronting respondent's federal civil rights lawsuit, petitioner seeks this Court's interlocutory review of the lower courts' decision at the motion-to-dismiss stage that he is not entitled to absolute immunity under *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). The questions presented are:

1. Whether the Court should grant interlocutory review to consider whether the *Briscoe* rule of absolute immunity for trial testimony should extend to an extra-judicial conspiracy to present perjured grand jury testimony.

2. Whether the Court should grant interlocutory review to determine whether the district court correctly held it premature to decide, at the motion-to-dismiss stage, whether petitioner was a "complaining witness" who is not entitled to absolute testimonial immunity.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner is a policeman who, along with a colleague, initiated and encouraged respondent's arrest and prosecution on trumped-up weapons charges. Months later, the two officers lied to a grand jury to secure a criminal indictment of respondent resting on their false testimony and fabricated evidence; petitioner subsequently pleaded guilty to a charge of perjury stemming from those events. But petitioner now asks this Court to protect him from civil liability under 42 U.S.C. § 1983 for his conspiracy to falsely arrest, jail, and indict respondent. The Court should deny this request. The lower courts sensibly declined at this early motion-to-dismiss stage to grant petitioner absolute immunity for conspiring to prosecute an innocent man, and this Court should not disturb that determination.

In seeking review of the decisions below, petitioner maintains that the Second Circuit's recognition of a conspiracy exception to the immunity from liability for false grand jury testimony is inconsistent with this Court's decision in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), and in conflict with the holdings of other courts of appeals. Decision of that issue, however, is not necessary for the resolution of this case. The court below identified a second, independent basis for denying petitioner immunity from Section 1983 liability, the "complaining witness" doctrine, and remanded the case for a factual determination whether the requisites of *that* doctrine are present here. If they are, there will be no need for the Court to resolve the question presented in the petition. For

that reason alone, further review of this case, at least at this time, is inappropriate.

Even considered on its own terms, the questions presented by petitioner do not warrant this Court's attention. The instant case involves allegations of a broad conspiracy unfolding over many months, while *Briscoe* did not involve a conspiracy at all and most of the appellate decisions cited by petitioner involved limited conspiracies directed only at the presentation of false testimony; it is not at all apparent that the courts issuing those decisions would reject the Second Circuit's approach on the facts here. Moreover, in contrast to decisions in most other circuits, this case involves testimony before the *grand* jury—where lies are less likely to be uncovered and where, consequently, more robust liability rules are appropriate. And the issue presented in the petition is, in any event, one of limited practical importance: in fact, we are not aware of *any* case in which a court within the Second Circuit *ever* has held a defendant liable through application of the conspiracy exception. The petition accordingly should be denied.

A. Factual Background

1. Respondent's Encounter With Police

On October 9, 2004, respondent was driving a car when he was pulled over by Nassau County police officer James Vara in the Village of Floral Park on Long Island, New York. Pet. App. 72a.[1] Vara refused

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[1] These facts are drawn from the complaint and materials included by petitioner in his petition appendix. Because this case was resolved at the motion-to-dismiss stage, the allegations in the complaint must be presumed true. *Erickson* v. *Pardus*, 551 U.S. 89, 93-94 (2007).

to tell respondent the reason for the stop (Pet. App. 72a), although the officer's conduct strongly suggested that it was motivated by respondent's race. Compl. ¶¶ 31, 34. Vara asked respondent to step out of the car, administered a sobriety test, and called for backup. Pet. 4; Pet. App. 72a-73a. Petitioner then arrived on the scene. Pet. App. 72a-73a. One of the officers grabbed respondent and, when respondent protested, threatened "to do more than grab him." Pet. App. 73a. Respondent, scared, began to run. Pet. App. 73a. One of the officers shouted, "Shoot him in the back." Pet. App. 73a. Respondent kept running, jumped over a fence, and took a cab home. Pet. App. 73a. Respondent did not have a gun during his encounter with police. Pet. App. 73a.

2. Respondent's Arrest

Respondent subsequently turned himself in to authorities, was arrested and subjected to a strip and body cavity search, and was charged with two counts of criminal possession of a weapon. Compl. ¶¶ 19, 37. As evidenced by the subsequent false testimony of petitioner and Vara before the grand jury, the apparent basis for the charges was (1) Vara's representations that he heard an object fall to the ground as respondent was jumping over the fence, and that Vara later returned and identified the object as a 9-millimeter handgun; and (2) petitioner's virtually identical statements that he heard a 9-millimeter handgun fall from respondent as respondent jumped the fence, and that petitioner remained with the handgun until he was relieved by another officer. Compl. ¶¶ 19, 23, 24. Respondent was jailed for two days before securing release on bail of $10,000 cash and a $25,000 bond. Compl. ¶¶ 19-20. The charges

carried a potential penalty of two to seven years in prison. Compl. ¶ 19.

3. Petitioner's Perjury Before The Grand Jury

More than five months later, a state grand jury convened to consider whether to indict respondent on weapons charges. Compl. ¶ 20. Both petitioner and Vara lied to the grand jury. Both claimed that they heard a gun drop to the ground while chasing respondent. Compl. ¶¶ 23-24. Petitioner testified that "I heard a noise as [respondent] went to jump the fence, which sounded like metal hitting the ground * * *. I looked down to see what it was and found the gun there." Pet. App. 30a-31a. Petitioner further testified that he stayed with the gun to "safeguard" it. Pet. App. 32a. Likewise, Vara testified that, "as [respondent] jumped over the fence, I heard a metal noise hitting concrete, and I looked down, and I saw an object laying on the driveway * * *. My assisting officer [petitioner] stayed there at the scene * * *." Pet. App. 32a.

Respondent testified before the grand jury and maintained his innocence. Pet. App. 72a-73a. But following the false, coordinated testimony of petitioner and Vara (Compl. ¶¶ 23-24), the grand jury voted to indict respondent. Compl. ¶ 22. Although the passengers riding in the car with respondent were prepared to testify in support of his account, their evidence was not presented to the grand jury. Compl. ¶¶ 21-22; Pet. App. 74a.

4. Petitioner's Perjury Is Exposed

The perjury of petitioner and Vara came to light in July 2005, when a police officer from the Village of Floral Park contacted respondent's counsel to advise

that it was that officer—not petitioner or Vara—who had first discovered a handgun lying on the ground in the area where Vara had chased respondent. The Floral Park officer also stated that he had not seen the gun until approximately forty minutes after the pursuit had begun. Compl. ¶ 25. Radio transmissions from the date of the incident confirmed the local officer's account. Compl. ¶¶ 25-26. These disclosures led the prosecutor to dismiss the entire case against respondent and, in turn, to charge petitioner with perjury before the grand jury. Compl. ¶¶ 27-28. Petitioner eventually pleaded guilty to criminal perjury. Compl. ¶ 28.

B. Proceedings Below

1. The Complaint

On August 28, 2007, respondent filed this suit against petitioner and other defendants pursuant to 42 U.S.C. §§ 1981 and 1983 and state tort law. Compl. ¶ 1. The allegations in the complaint focus chiefly on petitioner's role as a "complaining witness[]." Compl. ¶ 23. The complaint alleges, for example, that petitioner "actively instigated and encouraged the baseless prosecution" of respondent. Compl. ¶ 19. In addition, it states that "each of the Defendants took an active role in creating and manufacturing the charges against [respondent], solely for the purposes of effecting an arrest and conviction." Compl. ¶ 46.

The complaint also alleges misconduct by petitioner, including the false arrest and false imprisonment of respondent, that occurred several months *prior to* petitioner's eventual perjury before the grand jury. It alleges, for example, that petitioner "deprived [respondent] of his Fourth, Fifth, Sixth,

and Fourteenth Amendment rights, and caused such deprivation of rights by unlawfully stopping, falsely detaining, unlawfully accusing, wrongfully arresting and falsely imprisoning [respondent] for two days." Compl. ¶¶ 31, 40. The complaint further alleges that the "seizure [of respondent] was made without probable cause" as petitioner was "of the knowledge that [respondent] had committed no crime" (Compl. ¶ 42), that petitioner and the other defendants "prolonged [respondent's] captivity by failing to investigate [his] protests that he was not the alleged perpetrator and by conspiring to set bail at an unreasonable amount" (Compl. ¶ 33), and that petitioner and the other defendants "withheld information which would have exonerated [respondent] of the criminal charges" he faced. Compl. ¶ 44.

2. Petitioner's Motions

Petitioner moved to dismiss the claims or, alternatively, for summary judgment, on the grounds of absolute testimonial immunity. He relied chiefly on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), in which this Court concluded that a police officer has absolute immunity from civil damages under Section 1983 for giving perjured testimony at a criminal trial.

Respondent countered that petitioner was not entitled to absolute immunity for several reasons. Pl. Opp. to Def. Mot. to Dismiss 8-11.[2] First, respondent contended—as alleged in the complaint (Compl. ¶ 23)—that petitioner was a "complaining witness" who, in contrast to ordinary testimonial witnesses, is not entitled to absolute immunity under *Briscoe*. Re-

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[2] *Coggins* v. *County of Nassau*, No. 2:07-cv-03624-JFB-AKT (E.D.N.Y. Feb. 29, 2008).

spondent contended that later discovery would factually substantiate petitioner's complaining witness role.

Second, respondent argued that the complaint against petitioner involved *more* than just his false testimony at the grand jury proceedings. See, *e.g.*, Compl. ¶¶ 19, 36, 72, 79, 80. Respondent contended that the *Briscoe* rule of absolute testimonial immunity does not extend retroactively to immunize pretestimonial conduct of police officers who engage in unlawful arrest, fabrication of evidence, and the initiation or instigation of a malicious prosecution.

Third, respondent noted that, even if the focus were on only petitioner's false grand jury testimony, the holding in *Briscoe* is limited to perjured testimony *at trial* and therefore does not apply to petitioner's testimony before the grand jury. See *Briscoe*, 460 U.S. at 328 n.5 (leaving open the question of immunity for testimony at pre-trial proceedings).

3. The District Court's Ruling

Because discovery had not yet begun, the district court treated petitioner's motion solely as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and not as a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Pet. App. 13a-15a (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986)). On the basis of respondent's substantiated showing of need for discovery,[3] the district court concluded that petitioner's summary judgment motion was premature and

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[3] Respondent submitted an affidavit pursuant to Fed R. Civ. P. 56(f) attesting to the need for discovery. The district court's assessment of that affidavit, which petitioner asks this Court to review, is discussed below at 17-18.

should be dismissed without prejudice to his renewing it at the close of discovery. Pet. App. 15a-18a.

Turning to the merits of the motion to dismiss, the district court denied petitioner's claim of absolute immunity on two independent grounds.[4] First, it noted the well-established law of the Second Circuit that a "complaining witness" is not entitled to the benefit of absolute testimonial immunity. Pet. App. 24a (citing, *e.g.*, *White* v. *Frank*, 855 F.2d 956, 958-959 (2d Cir. 1988), which held, in reliance on *Malley* v. *Briggs*, 475 U.S. 335 (1986), that a "complaining witness" is not subject to the *Briscoe* immunity rule). The district court concluded, however, that it was not possible at the Rule 12(b)(6) stage to determine as a factual matter whether petitioner had acted as a "complaining witness." Pet. App. 25a-27a. The district court noted that the complaint "alleges acts by [petitioner]—separate and apart from perjury—that served to initiate [respondent]'s prosecution," including allegations that petitioner "'ordered and directed' [respondent]'s arrest and detention (Compl. ¶ 43), and 'withheld information which would have exonerated [respondent] of the criminal charges with which he was charged' (Compl. ¶ 44) * * *." Pet. App. 25a.

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[4] In deciding to treat petitioner's motion as one to dismiss, the district court took judicial notice of transcripts from respondent's grand jury proceedings that were addressed in the complaint. See, *e.g.*, *Roth* v. *Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (noting that "[i]n certain circumstances, the court may permissibly consider documents other than the complaint in ruling on a motion under Rule 12(b)(6)"). The district court declined to consider various other exhibits proffered by petitioner, but held that even had they been considered, "those additional documents would not change the Court's analysis at this stage of the litigation." Pet. App. 19a-20a.

Thus, while stressing that "the availability of absolute immunity should be decided at the earliest possible juncture," the district court "decline[d] to rule as a matter of law at this stage" on the immunity claim because it could not resolve the factual question whether petitioner was a complaining witness. Pet. App. at 26a.

Second, apart from the "complaining witness" doctrine, the district court noted "an additional, independent obstacle to [petitioner's] assertion of absolute immunity at this juncture" (Pet. App. 27a): the Second Circuit has recognized an exception to *Briscoe* for extra-judicial conspiracies to present perjured testimony before a grand jury. Pet. App. 27a-28a (citing *Dory* v. *Ryan*, 25 F.3d 81 (2d Cir. 1994), and *San Filippo* v. *U.S. Trust Co. of N.Y., Inc.*, 737 F.2d 246 (2d Cir. 1984)). Accordingly, petitioner could not qualify for absolute immunity to the extent that "the complaint alleges that Vara and [petitioner] conspired to commit perjury during [respondent]'s grand jury proceedings." Pet. App. 27a. The court noted that there was no dispute that petitioner pleaded guilty to perjury and found that the complaint alleged facts sufficient to support an inference of an extra-judicial conspiracy to commit perjury, insofar as petitioner and Vara offered interlocking accounts to the grand jury falsely claiming that both heard respondent drop a gun. Pet. App. 30a-33a. The court cautioned that it "reaches this conclusion [concerning application of the extra-judicial conspiracy exception to absolute immunity] without prejudice to [petitioner] arguing that he is entitled to immunity at the summary judgment stage, after the parties

have had the opportunity to conduct discovery." Pet. App. 34a n.8.[5]

4. The Court Of Appeals Decision

By unpublished summary order, the court of appeals affirmed in part and dismissed in part. Pet. App. 1a-4a. First, with respect to the district court's ruling concerning the extra-judicial conspiracy exception, the Second Circuit noted that "[i]n this Circuit, * * * absolute immunity does not extend to allegations of conspiracy to present false testimony." Pet. App. 3a. Second, the court concluded that "[a]bsent a more developed record of undisputed facts, we are unable to determine as a matter of law that Buonora was not a complaining witness." The court therefore held that "we lack jurisdiction to consider this issue" on interlocutory appeal from the denial of a motion to dismiss. Pet. App. 3a. The court remanded the case for further proceedings.

REASONS FOR DENYING THE PETITION

In seeking review, petitioner maintains that the Second Circuit's recognition of an extra-judicial conspiracy exception to the immunity rule of *Briscoe* departs from this Court's holding in that case and conflicts with the decisions of most other courts of appeals. But he is wrong on both counts. *Briscoe* did not purport to immunize extra-judicial acts of conspiracy, like those committed by petitioner here, and the theory underlying *Briscoe* offers no support for that

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[5] With regard to respondent's state-law claims, the district court dismissed without prejudice the claims for abuse of process and malicious prosecution and granted respondent "leave to replead the requisite special damages with sufficient specificity." Pet. App. 43a.

expansive rule of immunity. Similarly, although some courts of appeals have rejected a general conspiracy exception to *Briscoe*, the decisions from other circuits cited by petitioner differ from this case in material respects, and there is reason to believe that those courts, if presented with facts like those here, would accept the Second Circuit's rule.

Petitioner, however, also has a more immediate and basic problem in seeking review: decision of the principal question he presents in the petition is unnecessary now and very likely would have no bearing on the ultimate outcome of this case. Wholly apart from the conspiracy exception to testimonial immunity, the district court held below that petitioner's immunity might be pierced by application of the *separate* complaining witness doctrine; the court of appeals, which lacked jurisdiction to consider petitioner's challenge to that ruling, remanded the case for a factual determination whether the complaining witness rule applies in this case. If it does, there would be no reason *ever* to decide the conspiracy issue presented in the petition. In such circumstances, review of this case now plainly is unwarranted.

I. THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE EXTRA-JUDICIAL CONSPIRACY EXCEPTION BECAUSE RESOLUTION OF THE ISSUE WILL NOT DETERMINE PETITIONER'S ENTITLEMENT TO IMMUNITY.

Petitioner's principal contention is that the Court should grant review to determine the validity of the conspiracy exception to testimonial immunity. Pet. 7-24. But even if that question might warrant this Court's consideration in *some* case—and, as we show below, it does not—review in *this* case would be im-

proper. This question is of only academic, and secondary, importance here: whatever the application of the conspiracy exception to testimonial immunity, this case will proceed on remand to determine application of the separate complaining witness doctrine. And if that doctrine is held to apply after further factual development below, resolution of the conspiracy question presented in the petition will be wholly unnecessary. For that reason alone, the petition should be denied.

A. Continued Litigation Regarding The Complaining Witness Issue Will Be Necessary Regardless Of The Disposition Of The Petition.

Even if this Court were to grant review and reject the extra-judicial conspiracy exception to immunity, this suit would still proceed. As petitioner recognizes, the complaining witness doctrine offers a *separate* basis for piercing his immunity. See Pet. 9. Rooted in this Court's recognition that "complaining witnesses were not absolutely immune at common law" (*Malley* v. *Briggs*, 475 U.S. 335, 340 (1986)), that doctrine strips immunity from "one who procured the issuance of an arrest warrant by submitting a complaint" that "was made maliciously and without probable cause." *Id.* at 340-41; see also *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992) (complaining witness is one who "set[s] the wheels of government in motion by instigating a legal action"). As the Second Circuit and other courts of appeals accordingly have recognized, a complaining witness who "initiat[es] a baseless prosecution" through "testimony at a judicial proceeding" is "liable to the victim under section 1983." *White* v. *Frank*, 855 F.2d 956, 961 (2d Cir. 1988); see also, *e.g.*, *Harris* v. *Roderick*, 126 F.3d

1189, 1199 (9th Cir. 1997); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992).

Here, respondent invoked the complaining witness rule. The district court left the application of the doctrine unresolved, finding that further factual development was necessary to determine whether respondent was in fact a complaining witness. Pet. App. 23a-27a. And the court of appeals correctly determined that it did not have jurisdiction to decide whether petitioner was a complaining witness on interlocutory appeal because the factual record is undeveloped. Pet. App. 3a.

In these circumstances, review by this Court plainly is premature: the case is interlocutory, further proceedings below are unavoidable, and those proceedings could moot the conspiracy issue presented in the petition. This is the paradigm of the situation in which "the lack of finality in the judgment below may 'of itself alone' furnish 'sufficient ground for the denial of the [petition].'" Eugene Gressman *et al.*, SUPREME COURT PRACTICE 280 (9th ed. 2007) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)); see also *id.* at 82 ("[R]eview of a nonfinal order may induce inconvenience, litigation costs, and delay in determining ultimate justice." (citing *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-153 (1964))). Here, moreover, there would be no countervailing interest to be served by immediate review. Ordinarily, as petitioner notes (Pet. 20), there is value in a quick resolution of immunity claims "so that the costs and expenses of trial are avoided where the [immunity] defense is dispositive." *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). But that consideration is wholly absent in this case because further proceedings will be held in the district

court in any event. And if petitioner *is* held to be a complaining witness after remand, there will be no need at all for the Court to resolve the conspiracy question presented here.

This consideration militates against immediate review with particular force here because the facts alleged in the complaint strongly suggest that petitioner *will* be found to be a complaining witness. As the Court explained in *Malley*, a police officer who causes a victim to be arrested unconstitutionally does not receive absolute immunity. *Malley*, 475 U.S. at 341. In *Mejia* v. *City of New York*, a case illustrative of how the district court will determine petitioner's complaining witness status here, the court stated that an individual is a complaining witness "if the information [he] falsely gave the prosecutor induced the prosecutor to act." 119 F. Supp. 2d 232, 272 (E.D.N.Y. 2000).

That would seem to be this case. Petitioner has already pled guilty to perjuring himself before the grand jury that indicted respondent. Pet. App. 11a. The Nassau County District Attorney's Office dismissed the charges against respondent when it discovered petitioner's perjury, suggesting that the perjured testimony, along with the manufactured evidence, was central to the decision to indict. *Ibid.* In addition, respondent alleged that petitioner "ordered and directed" respondent's arrest and detention (Compl. ¶ 43) and "withheld information which would have exonerated [respondent] of the criminal charges." Compl. ¶ 44. Such actions also amounted to an inducement for the prosecutor to act. On the facts alleged, it thus is likely the district court on remand will find petitioner to be a complaining witness not entitled to absolute immunity. And that will make a

ruling by this Court on the conspiracy exception unnecessary.

B. Petitioner's Procedural Criticisms Of The District Court's Denial Of Summary Judgment Are Meritless.

In fact, petitioner evidently recognizes that he cannot prevail on immunity grounds (and that consideration of the case by this Court therefore is inappropriate) so long as the complaining witness issue remains in the case. He accordingly asks the Court to review not only the conspiracy question, but also the district court's denial of his motion for summary judgment on the complaining witness issue. But as to that, petitioner does not contest the validity of the complaining witness doctrine generally; instead, he asserts only that the Second Circuit misapplied its *own* summary judgment law. Pet. 24-31. That contention is self-evidently insupportable for several reasons. As a consequence, petitioner's argument for review of the complaining witness issue addressed below lacks merit; the case necessarily will proceed no matter how the conspiracy issue is resolved—and review accordingly should be denied.

First, the simple fact is that the Second Circuit had—and this Court has—no jurisdiction to consider petitioner's challenge to the interlocutory denial of his summary judgment motion. Generally, the denial of a motion to dismiss or for summary judgment is not a final judgment subject to appeal under 28 U.S.C. § 1291. Appeal is permitted where the motion is premised on a defendant's immunity from suit, but *only* "to the extent that it turns on an issue of law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). Thus, where "the district court's determination [is] that the summary judgment record * * * raised a genuine is-

sue of fact," a decision relating to immunity is "not appealable." *Johnson* v. *Jones*, 515 U.S. 304, 313 (1995); see also *Walczyk* v. *Rio*, 496 F.3d 139, 153 (2d Cir. 2007) (denial of motion to dismiss is appealable only "to the extent the immunity claim presents a 'purely legal question'" (quoting *Mitchell*, 472 U.S. at 530)). That is the case here: the court below held that resolution of the complaining witness issue required factual inquiry, to be undertaken by the district court, into the circumstances of petitioner's grand jury testimony. Thus, the court of appeals not only had no obligation to engage in an interlocutory *de novo* review of this fact-intensive evidentiary question, as petitioner demands (Pet. 25, 28-29); it had no appellate jurisdiction to do so. See Pet. App. 3a; *White*, 855 F.2d at 957; *Anthony*, 955 F.2d at 1399.[6]

Second, even if there were jurisdiction to consider petitioner's challenge, he would be wrong in contesting the district court's conclusion that summary judgment was premature because respondent had not yet had an opportunity to conduct discovery. See Pet. 29. Summary judgment is proper only if materials such as "depositions, * * * admissions, [and] interrogatory answers * * * do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1). Rule 56 contemplates "adequate time for discovery" prior to the entry of summary judgment. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); see also *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 884 (1990) (reaffirming *Celotex*). But respondent

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[6] Petitioner appears to suggest that *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), held all immunity claims appealable. Pet. 21 n. 4. In fact, *Iqbal* did not depart from the settled rule limiting interlocutory immunity appeals to matters that "turn[] on an issue of law." 129 S. Ct. at 1946 (quoting *Mitchell*, 472 U.S. at 530).

has not at this juncture had the opportunity to depose petitioner, or anyone else. The district court therefore lacked sufficient information to evaluate petitioner's motion pursuant to Rule 56(c).

Significantly, while petitioner argued before the court of appeals that he was entitled to summary judgment, he did not dispute the district court's analysis of his motion to dismiss pursuant to Rule 12(b)(6). Petitioner has therefore waived any challenge to the district court's finding, under Rule 12(b)(6), that the complaint adequately alleged specific acts by petitioner that served to initiate and continue respondent's prosecution. Pet. App. 25a-26a. Because the sufficiency of the pleading has clearly been established in accordance with the standard this Court set out in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), petitioner's reliance on cases such as *Thomas* v. *Roach*, 165 F.3d 137, 147 (2d Cir. 1999), where summary judgment was granted prior to discovery *because the pleadings were facially deficient*, is unavailing.

Third, petitioner quarrels with the district court's evaluation of the affidavit that respondent submitted in support of his averment of the need to conduct discovery before responding to a summary judgment motion. See Pet. 27-28. The Second Circuit has specified the required showing to be made in such a Fed. R. Civ. P. 56(f) affidavit. See *Gurary* v. *Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) (stating that an affidavit must show "'(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts'" (alteration

in original)). Petitioner does not contend that these standards are in conflict with those of other circuits or with this Court's opinions. He merely attempts to second-guess the district court's application of Second Circuit precedent to respondent's affidavit in this case.[7] This claim does not merit this Court's review.

II. THE DECISION BELOW IS CORRECT.

For the reasons explained above, consideration of the issues presented in the petition are premature. But even if that were not so, review of this case would not be warranted. We explain below why petitioner is incorrect in asserting that there is a pervasive conflict in the circuits on the question presented here. But before turning to that issue, we address petitioner's initial contention that the holding below is inconsistent with *Briscoe*. See Pet. 9-13. On this, petitioner is wrong: the Second Circuit's decision is a faithful application of this Court's precedent.

A. The Extra-Judicial Conspiracy Exception Follows From This Court's Recognition That Conspiracies Are Crimes That Are Separate From The Object Of The Conspiracy.

1. In *Briscoe*, the decision on which petitioner principally relies, the Court held that a police officer

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[7] Respondent's affidavits, Pet. App. 64a-76a, laid out in detail the disputed facts for which discovery is necessary. The district court found that respondent had "wholly complie[d] with the standard the Second Circuit has set forth for compliance with Rule 56(f); he has particularized the discovery required — the materiality of which * * * is beyond dispute — and has explained why he has not obtained discovery to date." Pet. App. 16a.

is immune from Section 1983 liability for false testimony offered at a criminal trial in support of the plaintiff's conviction. The Court relied on common law history, observing that "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings" was established at the time of Section 1983's enactment. 460 U.S. at 330-333, 336 n.15. This doctrine was premised on the understanding that absolute witness immunity was necessary to prevent "two forms of self-censorship." *Id.* at 333. First, immunity ensures that witnesses will not be "reluctant to come forward to testify." *Ibid.* Second, "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Ibid.* Immunity thus encourages witnesses to make "'full disclosure of all pertinent information within their knowledge.'" *Id.* at 336.

But these rationales for immunity have no application when the Section 1983 suit challenges, not false *testimony* offered in court, but an extra-judicial *conspiracy* to commit perjury. Insofar as immunity rests on "functional categories" (*Briscoe*, 460 U.S. at 342) or an official witness's "critical role in the judicial process" (*id.* at 336), the conduct meriting protection is the testimony itself; it is not the extra-court agreement to further an unwarranted prosecution.

This conclusion follows directly from the Court's consistent recognition that conspiracies are "evil" acts, quite "distinct" from the substantive crimes they are formed to commit. *Salinas* v. *United States*, 522 U.S. 52, 65 (1997); see also *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *United States* v. *Rabi-*

nowich, 238 U.S. 78 (1915). "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues" (*Salinas*, 522 U.S. at 65); a conspiracy is "an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Rabinowich*, 238 U.S. at 88. This characterization of conspiracies as separate from, and often worse than, substantive crimes weighs heavily in favor of recognizing that immunity for testimony does not extend to prior conspiracies to falsify testimony.

By the same token, the prophylactic policies that favor absolute witness immunity—policies that justify allowing witnesses to escape liability for their testimony even when they commit perjury—have no direct application to conspiracies to commit criminal acts. On the one hand, the injury inflicted by conspiratorial conduct may be vastly greater than that caused by a perjurer who acts alone, as the existence of the criminal agreement both cements each participant's intent to testify falsely and magnifies the impact of the false testimony. The Court has noted that conspiracies "involve[] deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices," and are "characterized by secrecy, rendering [them] difficult of detection, requiring more time for [their] discovery, and adding to the importance of punishing [them] when discovered." *Pinkerton*, 328 U.S. at 644 (internal quotations omitted). And on the other hand, the benefits of immunity are greatly diminished in the conspiracy context: when the focus is on extrajudicial agreement rather than in-court testimony, the prospect of liability is much less likely to deter truthful testimony. In this setting, the balance tips in favor of the additional deterrence Section 1983 li-

ability provides to discourage the extra-judicial conspiracy in the first place.

2. In punishing the conspiracy and not the testimony, the conspiracy exception in no way undermines the absolute immunity awarded legitimate testimony. The exception serves only to discourage non-testimonial, extra-judicial conduct committed *before* a judicial proceeding. Those witnesses who mistakenly offer false evidence in good faith, and even those who deliberately perjure themselves but do not do so as part of an extra-judicial conspiracy, remain entitled to *Briscoe* immunity.

In nevertheless rejecting the conspiracy exception, the Seventh Circuit, in an analysis that has been followed by other circuits, reasoned that someone "may not be prosecuted for conspiring to commit an act that he may perform with impunity." *House* v. *Belford*, 956 F.2d 711, 720 (7th Cir. 1992); see also *Mowbray* v. *Cameron County*, 274 F.3d 269, 277 (5th Cir. 2001) (quoting *House*, 956 F.2d at 720); *Jones* v. *Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999) (quoting *House*, 956 F.2d at 720). But this argument does not stand up to scrutiny. Conspirators may be prosecuted for agreeing to break the law even if their plans do not succeed. See *United States* v. *Jimenez Recio*, 537 U.S. 270, 274 (2003); *Salinas*, 522 U.S. at 65. And, of course, even though *Briscoe* holds that a perjurer may not be made civilly liable for false testimony under Section 1983, perjury remains "a corruption of the truth-seeking function of the trial process" (*United States.* v. *Agurs*, 427 U.S. 97, 104 (1976)) and a criminal act, as demonstrated by petitioner's prosecution and conviction for perjury in this case. Compl. ¶ 28. Persons who conspire to commit perjury thus manifestly may *not* perform the object

of their conspiracy "with impunity." For this reason—as the Seventh Circuit itself noted shortly after its decision in *House*—"constitutional wrongs completed out of court are actionable even if they lead to immunized acts." *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994).

3. That especially should be so because immunity for conspiratorial conduct, at least as petitioner seems to contemplate it operating, would protect a wide range of misbehavior that is only tangentially connected to testimony in court. Petitioner presents this case as though it involves *only* false testimony. But that is not so: as we have explained, the complaint alleges that petitioner's conspiracy was not limited to coordinating plans to commit perjury, but also included further violations of respondent's civil rights, such as fabrication of evidence and false arrest. See Pet. App. 25a. And more generally, the practical reality is that conspiracy to commit perjury never comes to life, fully formed, in the grand jury room. The conspirators almost inevitably have had, as part of the conspiracy, pre-testimonial dealings with police officers, prosecutors, and others in the criminal justice process. And their conspiratorial acts necessarily extend well beyond the testimony itself. Invariably, for example, conspiratorial grand jury witnesses first tell their false stories to the prosecutor outside the jury room, an action closely akin to that of complaining witnesses who sign accusatory instruments that initiate a prosecution.

In such circumstances, petitioner presents no reason *why* he should be wholly immune from liability for conspiratorial actions taken prior to his perjury. Barring liability for wrongful conduct that is not wholly testimonial threatens to immunize actions

with only a tenuous connection to false testimony. But surely, absolute immunity should not be allowed to "spread backwards like an inkblot, immunizing everything it touches." *Guzman-Rivera* v. *Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir. 1995); see also *Moldowan* v. *City of Warren*, 578 F.3d 351, 390 (6th Cir. 2009) ("[Immunity] does not extend to [defendant's] non-testimonial conduct, 'despite any connection these acts might have to later testimony.'"), cert. denied, 130 S. Ct. 3504 (2010); *Paine* v. *City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) ("This [absolute] immunity, however, is not limitless. * * * [It] does not shield non-testimonial conduct."). And although witnesses may not be held liable *for* their false testimony, evidence of coordinated perjury by conspirators may be used to establish a broader agreement to deny the plaintiff his or her civil rights—as it manifestly does in this case. See, *e.g.*, *Pearl* v. *City of Long Beach*, 296 F.3d 76, 87 (2d Cir. 2002) (finding that "it was a reasonable inference that the officers had agreed to present their allegedly false" testimony because it was identical).

A rule that recognized immunity in such circumstances would have bizarre and destructive consequences, allowing the fact of perjurious testimony at the end of the conspiracy to immunize the fabrication of evidence, false arrest, and malicious prosecution that took place at the outset. It also would create peculiar problems of administration. Petitioner's approach, for example, evidently would mean that suits could proceed against defendants who entered into a conspiracy to commit perjury that was uncovered before the testimony was offered (assuming, of course, that the conspiracy still injured the plaintiff), but that suit contesting that same conspiracy would be barred by immunity if the conspirators actually testi-

fied. There can be no justification for such a peculiar rule.

And to the extent there is any doubt on this score, it counsels in favor of delaying review of this case. The district court, "accepting all allegations in the complaint as true, and drawing all reasonable inferences in [respondent's] favor," found "that the allegations of an extra-judicial conspiracy in [respondent's] suit are sufficient to overcome [petitioner's] claim of absolute immunity at the motion to dismiss stage." Pet. App. 28a-29a. But additional fact-finding will proceed on this question, and the court specifically noted that it reached its conclusion "without prejudice to [petitioner] arguing that he is entitled to immunity at the summary judgment stage, after the parties have had the opportunity to conduct discovery." Pet. App. 34a n.8. It accordingly is possible that petitioner will be *awarded* immunity on remand. If he is not, additional factual development about the scope of the conspiracy would greatly assist the Court in its consideration of the issue presented by petitioner (assuming that issue warrants the Court's attention at all), as it would allow the Court to address both the extent of, and limits on, the extra-judicial conspiracy exception. In either case, review at this point is inappropriate.

B. The Truth-Seeking Mechanisms Of The Grand Jury Should Be Augmented By The Conspiracy Exception Because They Are Significantly Weaker Than Those Available At Trial.

In addition, the rationale for trial witness immunity identified in *Briscoe* applies with greatly diminished force in the grand jury setting. Grand juries need truthful information to protect citizens from

unwarranted indictments, yet they lack truth-seeking tools such as cross-examination with which to determine the veracity of witness testimony. The Court relied heavily on these truth-seeking mechanisms when it held in *Briscoe* that absolute immunity is desirable for trial witnesses because "the truth-finding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the fact-finder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Briscoe*, 460 U.S. at 333-34 (internal quotations omitted).

Cross-examination has famously been identified by the Court as the "greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158 (1970) (internal quotations omitted). But grand juries are "ex parte investigation[s]" rather than "adversary hearing[s]," and so do not permit cross-examination of witnesses. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Other truth-seeking mechanisms used by trial courts, such as confrontation by the opposing party (see *Crawford* v. *Washington*, 541 U.S. 36, 50-51 (2004)) and demeanor evidence (see *Green*, 399 U.S. at 158), are also less available to the grand jury. Defendants may not attend grand jury proceedings and, indeed, may never discover who appeared to testify. See *Giles* v. *California*, 128 S. Ct. 2678, 2689 (2008). And although oaths to tell the truth are administered before the grand jury, in the context of a conspiracy to commit perjury the value of the oath is negated because the conspirators have already committed a crime by agreeing to disregard it.

In *Briscoe*, this Court recognized that, when all of these tools are brought to bear on a trial witness's testimony, the fact-finder is provided with a sufficient basis on which to determine the truth. 460 U.S. at 333-334, 342. In contrast, the absence of these truth-seeking mechanisms in grand jury testimony makes the conspiracy exception essential to deterring extra-judicial conspiracies of the type alleged in this case.

III. PETITIONER OVERSTATES THE EXTENT AND EFFECT OF ANY DISAGREEMENT IN THE CIRCUITS.

Finally, petitioner maintains that, "[w]ith the exception of the Second Circuit, the totality of the Circuit Courts of Appeals that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any conspiracy to commit perjury" (Pet. 14)—asserting that no fewer than seven circuits have rejected the conspiracy exception recognized by the Second Circuit. Pet. 14-20. On examination, however, this assertion of a pervasive conflict in the courts of appeals on the question presented here collapses. To be sure, a number of other courts have rejected a general conspiracy exception to *Briscoe*, and some have specifically disagreed with the Second Circuit's reasoning on that question. See *Mowbray*, 274 F.3d at 277; *Franklin* v. *Terr*, 201 F.3d 1098, 1102 (9th Cir. 2000); *Cannon*, 174 F.3d at 1288-1289; *Miller* v. *Glanz*, 948 F.2d 1562, 1570 (10th Cir. 1991). But the decisions cited by petitioner differ in material respects from this one; it is not at all apparent that *this* case would have been decided differently in those courts. Particularly because the issue here is one that arises in-

frequently, there accordingly is no need for intervention by this Court now.

A. This Case Is Distinguishable From Those Decided By Other Circuits Because It Involves A Broader Conspiracy.

At the outset, most of the decisions cited by petitioner did not squarely address the question presented in this case. Petitioner conspired to (i) falsify evidence leading to respondent's arrest, (ii) synchronize post-arrest statements with Officer Vara, and (iii) falsify testimony leading to a grand jury indictment. See Pet. App. 8a-10a, 30-33a; Compl. ¶¶ 27, 46. Yet most of the allegedly conflicting decisions cited by petitioner considered conspiracies that were directed exclusively at testimony: those conspiracies were conceived close to the date of the testimony and aimed specifically at procuring false testimony. Thus, it is not clear that the courts deciding those cases would have rejected a conspiracy exception on the facts of this case.

Two of the decisions cited by petitioner involved conspiracies to coerce expert witnesses to provide false or prejudicial testimony. Given this focus on the expert witnesses' role at trial, these conspiracies were necessarily directed at the testimony itself. See *Franklin*, 201 F.3d at 1101-1102 (conspiracy between prosecution psychiatrist and state's witness to coordinate false testimony); *Moses* v. *Parwatikar*, 813 F.2d 891, 891 (8th Cir. 1987) (conspiracy between prosecutor and court-appointed psychiatrist to find defendant competent to stand trial). A third similarly involved assertions that a state social worker and a state psychologist conspired to give false testimony

in support of child abuse charges. *Watterson* v. *Page*, 987 F.2d 1 (1st Cir. 1991).[8] A fourth, although alleging a conspiracy that began well before the assertedly false testimony was given, was concerned exclusively with an agreement to present perjurious testimony. *Alioto* v. *City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987). In two other cases, the plaintiffs, although also alleging a number of other significant wrongful acts by the defendants, limited their allegations of conspiracy to the claim that the defendants "conspire[d] to present perjured testimony in furtherance of a criminal conviction" (*Glanz*, 948 F.2d at 1571) or "suborned false testimony." *Cannon*, 174 F.3d at 1288. Finally, petitioner cites two Seventh Circuit cases, both of which involved a conspiracy similarly limited to the testimony itself. *House*, 956 F.2d at 720 ("[Plaintiff] alleged [an] underlying conspiracy between [defendant] and Robbins to present

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[8] And, in any event, the language in *Watterson* on which petitioner relies is dicta. See 987 F.2d at 8-9. District courts in the First Circuit have recognized that, as a result, *Watterson* is not binding law for conspiracies to commit perjury. See, *e.g.*, *Maher* v. *Town of Ayer*, 463 F. Supp. 2d 117, 122 n.10 (D. Mass. 2006) ("To the extent that Maher is suggesting a pretrial conspiracy between Taylor and Goss to present perjured testimony at trial, there is case law supportive of a cause of action on this basis."); *Mitchell* v. *City of Boston*, 130 F. Supp. 2d 201, 211 (D. Mass. 2001) ("The First Circuit has not yet had the opportunity to speak with a firm voice in the post-*Briscoe* debate."); *ibid.* (finding that plaintiffs in First Circuit cases have never pled adequate facts to demonstrate an extra-judicial conspiracy exception to *Briscoe*); *Cignetti* v. *Healy*, 89 F. Supp. 2d 106, 117 (D. Mass. 2000) ("[W]itnesses may be sued under § 1983 for their testimony if the testimony they gave was part of a conspiracy consisting of their testimony and other non-testimonial acts."); see also Michael Avery, David Rudovsky & Karen Blum, *Police Misconduct: Law and Litigation* § 3:1 (2010).

the false testimony."); *Wilkins* v. *May*, 872 F.2d 190, 192 (7th Cir. 1989) (involving a "charg[e] that they had conspired to convict him of a crime he had not committed by giving perjured testimony").

There is substantial reason to believe that the more limited nature of the conspiracies alleged in these cases determined the courts' rulings on the conspiracy exception. In fact, five of these circuits have held that the absolute immunity afforded testimony does *not* retroactively immunize conduct that preceded the testimony. See *Spurlock* v. *Satterfield*, 167 F.3d 995, 1003-1004 (6th Cir. 1999) ("[A]bsolute immunity for testimony is a shield[,] * * * not a sword allowing [witnesses] to trample the statutory and constitutional rights of others. * * * [Witnesses are] not entitled to absolute immunity in performing any nontestimonial or pre/post-testimonial acts."); *Guzman-Rivera*, 55 F.3d at 29 (absolute immunity does not "spread backwards like an inkblot, immunizing everything it touches"); *Ienco* v. *City of Chicago*, 286 F.3d 994, 1000 (7th Cir. 2002) (noting that extra-testimonial conduct is not shielded by absolute immunity); *Paine*, 265 F.3d at 981 (same); *Thomas* v. *Hungerford*, 23 F.3d 1450, 1453 (8th Cir. 1994) (same). It may well be, as a consequence, that these courts would decline to award immunity when—as in this case—the conspiracy produced a range of acts, of which perjury was only the concluding part.[9]

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[9] Petitioner cites a total of seven purportedly conflicting circuits. Pet. 14. He fails to cite *Mowbray*, which is similar to the decisions he does cite and distinguishable for the same reasons. 274 F.3d at 275-276 (extending immunity to a conspiracy to cover up potentially exonerating forensic test results and mislead the grand jury).

B. This Case Is Distinguishable From Most Others Because It Involves Grand Jury Testimony.

In addition, this case involves a conspiracy to commit perjury before a grand jury. Although the Second Circuit applies the conspiracy exception to perjury before both grand and petit juries, it is not at all clear that other circuits would treat trial and grand jury testimony equivalently. There is no way to be sure about that: six of the purportedly conflicting circuits have not yet considered the extra-judicial conspiracy exception in the context of grand jury testimony. The First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have not; only the Sixth and Eleventh Circuits have. See *Cannon*, 174 F.3d 1271; *City of Shively*, 835 F.2d 1173.

And here, too, there is reason to believe that this distinction will make a difference: at least one circuit whose rule is relied upon by petitioner has suggested that grand jury testimony should *not* benefit from the same absolute immunity as trial testimony. See *Harris*, 126 F.3d at 1198 ("[Defendants'] argument here is * * * that if a conspiracy to lie is so successful that on the basis of the lies a grand jury finds probable cause, the conspirators become immunized for the constitutional injury they have caused. We disagree."). This is not surprising; as discussed above, there are a number of reasons why it makes sense for absolute *Briscoe* immunity to govern testimony at trial but not to shield extra-judicial conspiracies involving perjurious grand jury testimony. It thus cannot be assumed that circuits that have not had the opportunity to consider this issue will reject the Second Circuit's rule in the grand jury context.

C. The Second Circuit Applies The Extra-judicial Conspiracy Exception Too Infrequently For It To Pose A Significant Issue Meriting Review By This Court.

Against this background, whatever tension may exist in the ways in which the Second and other Circuits state their rules governing application of the conspiracy exception, there is no square conflict between the decisions of the courts: the courts of appeals have not reached differing conclusions in cases presenting substantially identical facts. There accordingly is no compelling need for the Court to address the matter now.

That is especially so because the issue here arises in the Second Circuit with great *in*frequency. In arguing to the contrary, petitioner contends that the Second Circuit's decisions in *San Filippo* and *Dory* "create[] a back door to the liability of witnesses for their testimony before a Grand Jury that was not envisioned by th[is] * * * Court in *Briscoe*." Pet. 19. The Second Circuit's extra-judicial conspiracy exception, however, creates liability based on the actions leading to perjurious testimony, rather than for the testimony itself. See *Dory*, 25 F.3d at 83. Indeed, *San Filippo* anticipated and repudiated the argument that the exception could be so broadly construed as to vitiate the immunity afforded by *Briscoe*. *San Filippo*, 737 F.2d at 255. Instead, the court of appeals stressed that the exception must be very cautiously allowed, that it is "imperative" for courts to "examine with great care" suits charging extra-judicial conspiracies, and that courts must "dismiss on pre-trial motion those that are clearly baseless." *Id.* at 256.

Courts in the Second Circuit have taken this guidance to heart, construing the conspiracy exception narrowly and applying rigorously the protections "provided by the possibility of 12(b)(6) dismissal or summary judgment in defendants' favor." *San Filippo*, 737 F.2d at 255. In the 25 years since *San Filippo* was decided, it appears that there have been a total of 23 cases in the Second Circuit bringing a Section 1983 claim against an individual other than a prosecutor for conspiracy to commit perjury.[10] Of these 23 cases, an allegation of extra-judicial conspiracy to testify falsely has survived the summary judgment stage a total of six times prior to the instant case. And of these, our research has revealed *no* case in which the defendant was found liable for participation in an extra-judicial conspiracy to commit perjury.[11]

The extra-judicial conspiracy exception thus is not the significant loophole that petitioner suggests.

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[10] *San Filippo* was decided before the Supreme Court's decision in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). *Dory* subsequently applied *Buckley* to limit *San Filippo*'s rule, holding that prosecutors are immune from the extra-judicial conspiracy exception when acting as an advocate. *Dory*, 25 F.3d at 83-84.

[11] Two of these cases settled. See Docket Order of Discontinuance, *Sheff* v. *City of New York*, No. 03-cv-00708 (S.D.N.Y. June 1, 2006); Settlement Agreement & Release, *Cipolla* v. *County of Rensselaer*, No. 99-cv-01813 (N.D.N.Y. Feb. 5, 2002). Three others were resolved in favor of the defendant. Order, *Dory* v. *Ryan*, No. 92-cv-04351 (E.D.N.Y. Sept. 18, 1998) (charges subsequently dropped); Stipulation and Order of Dismissal, *Tribune Co.* v. *Purcigliotti*, No. 93-cv-07222 (S.D.N.Y. Feb. 11, 1998) (dismissed with prejudice); Jury Verdict, *Taylor* v. *Hansen*, No. 85-cv-1643 (N.D.N.Y. June 23, 1993) (verdict for the defendant). Electronic records are not available from the remaining case.

It is a narrow doctrine that courts in the Second Circuit have carefully limited through the standard procedural tools. As such, petitioner's suggestion that the extra-judicial conspiracy exception threatens to undermine *Briscoe* is, based on 25 years of experience, plainly false. And for that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

POLICE OFFICER CRAIG BUONORA,

Petitioner

v.

DARRYL T. COGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I

THE SECOND CIRCUIT'S CREATION OF AN "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" TO THE *BRISCOE* RULE OF ABSOLUTE IMMUNITY CONFLICTS WITH THE CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT, AS WELL AS THE HOLDINGS OF THE EIGHT (8) OTHER CIRCUIT COURTS OF APPEALS TO HAVE CONSIDERED THIS ISSUE, AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

While spilling much ink in an attempt to justify the Second Circuit's creation of an extra-judicial conspiracy exception to the *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), rule of absolute immunity, Coggins inexplicably fails to deal with the singular issue presented on this petition; that is, that given the extraordinary split in Circuits presented here and discussed more fully below, together with the *Briscoe* holding itself, there are "compelling reasons" pursuant to this Court's Rule 10(a) for granting our request and permitting this matter to be fully briefed and heard by this Court.

In other words, whether we are correct that the Second Circuit should follow the other Circuit Courts of Appeals which have held that a witness who conspires to commit perjury is absolutely immune from §1981 and §1983 civil liability, or whether the respondent is correct, the conflict between the Circuits and the holding in *Briscoe* itself

are "compelling reasons" requiring the attention of this Court.

A. The *Briscoe* Holding

It is important to resolve the issue of absolute immunity "'at the earliest possible stage in litigation.' *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*." *Pearson v. Callahan*, 555 U.S. ---, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009). Moreover, this Court's discussion in *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) holds that "*immunity from suit*... is effectively lost if a case is erroneously permitted to go to trial. [Emphasis in original.]"; *see, also, Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953, 173 L.Ed.2d 868 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).") (For a full discussion see Points I and II in our Petition pp. 9-20.)

The decisions of the United States Court of Appeals for the Second Circuit, *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994), conflict with the decision of this Court in *Briscoe*. Therefore, consideration by this Court is compelling and necessary to maintain uniformity of the Court's decisions among the lower courts.

San Filippo, and *Dory*, create an "extra-

judicial conspiracy" exception to *Briscoe* which conflicts with the authoritative decisions of each of the other Eight (8) Circuit Courts of Appeals that have addressed this issue.

In *Briscoe*, it was noted that at common law, all persons who were integral parts of the judicial process were "provided absolute immunity from subsequent damages liability." *Id.* at 335. *Briscoe* dealt specifically with the question of whether a police officer who testified falsely at trial could be held liable for damages under 42 U.S.C. §1983.

This Court reasoned: "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions... and may be prosecuted subsequently for perjury." *Id.* at 342. The Court recognized that "[s]ubjecting... police officers to damages liability under §1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 345.

The District Court relied upon the Second Circuit's holdings in *San Filippo*, and *Dory*, in denying petitioner's motion to dismiss pursuant to FRCP 12(b)(6) and for summary judgment pursuant to FRCP 56 -- despite respondent's apparent claim to the contrary (see p. i of respondent's Brief in Opposition).

San Filippo extended the *Briscoe* grant of immunity to witnesses testifying in a grand jury proceeding but also created an "extra-judicial

conspiracy exception" to *Briscoe*'s absolute immunity. 737 F.2d at 255. *Dory* held that the "extra-judicial conspiracy exception" applies to police officers. 25 F.3d at 84.

The Second Circuit thereby created an exception where none was intended. No other Circuit Court has adopted these holdings.

> Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

Moses v. Parwatikar, M.D., 813 F.2d 891, 893 (8th Cir. 1987) , *cert denied*, 484 U.S. 832, 108 S.Ct. 108, 98 L.Ed.2d 67 (1987). *See, too, Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991).

B. All Eight (8) Circuit Courts of Appeals to have considered the "extra-judicial conspiracy exception" have rejected the Second Circuit's reasoning.

With the exception of the Second Circuit, all other Circuit Courts of Appeals (make that Eight (8) Circuits and counting) that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any

conspiracy to commit perjury. *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993); *Mowbray v. Cameron County, Tex.*, 274 F.3d 269 (5th Cir. 2001), *cert denied* 535 U.S. 1055, 122 S.Ct. 1912, 152 L.Ed.2d 822 (2002); *Alioto v. City of Shively, Kentucky*, 835 F.2d 1173 (6th Cir. 1987); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Moses v. Parwatikar, M.D., supra* (8th Cir.); *Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000); *Miller v. Glanz, supra* (10th Cir.); and *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999).

At the time we filed our Petition we were under the misapprehension that only seven (7) Circuits had rejected the Second Circuit's extra-judicial conspiracy exception to *Briscoe*. However, we have since learned that the Fifth Circuit has also concluded (*Mowbray, supra*) that the Second Circuit's rationale should be rejected.

Moreover, while the Fourth Circuit Court of Appeals has not yet addressed the issue in the context of a 1983 action, it has held government witnesses, including prosecutors alleged to have suborned perjury, immune from civil liability claims for perjured grand jury testimony as well as for conspiracy (*Lyles v. Sparks*, 79 F.3d 372 (4th Cir. 1996). That holding was applied to a 1983 action in *Marshall v. Odom*, 156 F.Supp.2d 525 (D. Maryland, Southern Division, 2001) in which the Court considered the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits' reasoning and rejected the Second Circuit's holding in *Dory*.

In the instant action, petitioner committed perjury, was subsequently indicted, and pled guilty --

precisely what is contemplated by *Briscoe* and the Eight (8) Circuit Courts of Appeals which have rejected the Second Circuit's holding.

This Court's Rule 10(a) demonstrates that a "compelling reason[]" for granting a Petition for a Writ of Certiorari may lie in the existence of the actions by a United States Court of Appeals in "enter[ing] a decision in conflict with the decision of another United States Court of Appeals on the same important matter". In this case, the "compelling reasons" for such a grant are underscored by Eight (8) Circuit Courts of Appeals' repudiation of the Second Circuit's holdings which conflict with the decisions of every other Circuit to have considered this issue.

II

PETITIONER IS ENTITLED TO RESOLUTION OF THE ABSOLUTE IMMUNITY QUESTION AT THE EARLIEST POSSIBLE STAGE OF LITIGATION.

In *Pearson v. Callahan, supra*, a unanimous Supreme Court "stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (citing *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991) (*per curiam*)). Moreover, petitioner is entitled to absolute immunity not just as a defense but from suit itself. *Mitchell v. Forsyth, supra*, 472 U.S. 511, 512, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *See, Saucier v. Katz*, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *See, too, Shmueli v. The City of New York*, 424 F.3d 231, 236 (2nd Cir. 2005).

This was reiterated recently in *Iqbal, supra*, where this Court reversed the Second Circuit's denial of a motion to dismiss on qualified immunity grounds, reasoning that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, *including 'avoidance of disruptive discovery.' Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)...." *Id.* at 1953 (emphasis added). In *Iqbal*, this Court dismissed Plaintiff's Complaint *prior to discovery*.

Accordingly, Officer Buonora is entitled to this determination at the earliest possible stage, especially where the District Court was presented with ample admissible evidence -- which was

undisputed -- to determine these issues.

III

THE DISTRICT COURT ERRED IN DETERMINING THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE AND THAT THE RESPONDENT'S AFFIDAVITS COMPLIED WITH RULE 56(f). MOREOVER, THE CIRCUIT COURT WAS REQUIRED TO CONSIDER THESE ISSUES *DE NOVO*.

A. Buonora cannot be viewed as a complaining witness.

Coggins erroneously states that the underlying motion was a Rule 12(b)(6) motion to dismiss (see p. i of respondent's Brief in Opposition). The motion for summary judgment was properly before the District Court. There was no request for, or denial of, conversion of a Rule 12(b)(6) motion to a Rule 56 motion. Rather, Buonora received the District Court's permission to make the Rule 56 motion for summary judgment.

The underlying motion herein was in fact one for summary judgment pursuant to Rule 56(a). As such, both the District Court and the Circuit Court of Appeals were provided with all evidentiary materials needed to prove that Buonora could not be found to be a complaining witness and therefore was entitled to summary judgment. No further discovery is

needed.[1]

Petitioner submitted evidence in admissible form consisting of copies of Nassau County Police Department reports, court records related to his perjury prosecution, and transcripts of petitioner and Vara's grand jury testimony. (See footnote 1 below.) Coggins submitted records of the Floral Park Police Department. The police records were business records and would be admissible at trial. F.R.E. 803(6); *Saks Int'l, Inc. v. M/V Exp. Champion*, 817 F.2d 1011 (2nd Cir. 1987). The submitted court records were certified and similarly self-authenticating.

Moreover, Coggins did not dispute Buonora's claim of absolute immunity in either his FRCP 56(f) Affidavit or his E.D.N.Y. Local Rule 56.1 Statement of Material Facts. Coggins failure is considered an admission under FRCP 56(e). *United States v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987). Among the admissions is that another officer arrested Coggins; another officer interviewed Coggins; the felony complaints were not prepared by Buonora; and Buonora did not testify at any evidentiary proceedings. Therefore, Buonora could not be found to be a complaining witness.[2]

The District Court only considered "the

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[1] This Court has the power to call up the Record from the Second Circuit. Given respondent's claim, we request that it do so. (See A.33-A.46 below.)

[2] See Petition, p. 27, footnote 6.

complaint and Coggins' Rule 56(f) affidavit [to conclude] that Buonora's motion for summary judgment is premature," and never considered the admissible evidence.

The Circuit Court was required to review *de novo* the denial of summary judgment when based on assertions of absolute and/or qualified immunity. *See, Walczyk v. Rio*, 496 F.3d 139, 153 (2nd Cir. 2007); *See also, Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999).

Summary judgment should be granted when "'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Concepcion v. U.S.*, 298 F.Supp.2d 351, 355 (E.D.N.Y. 2004) (*quoting*, FRCP 56 (c); *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 9 L.Ed.2d 265 (1986); *TransSport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2nd Cir. 1992) (*citing*, *Bryant v. Maffucci*, 923 F.2d 979, 982 (2nd Cir. 1991).

Petitioner set before the District Court a *prima facie* case entitling him to summary judgment based upon absolute immunity from suit arising out of his grand jury testimony pursuant to *Briscoe*. Petitioner also set forth a *prima facie* case establishing as a matter of law that he is not a complaining witness, based upon *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). *Malley* is clearly distinguishable. In *Malley*, a police officer submitted a false affidavit for an arrest warrant at an *ex parte* hearing.

Coggins did not dispute any of the factual assertions related to Buonora's claim of absolute witness immunity.

Buonora's assistance at the scene and subsequent grand jury testimony did not institute the proceeding against Coggins and therefore did not make him a complaining witness. *See, Sykes v. James*, 13 F.3d 515, 520 (2nd Cir. 1993), *cert denied* 512 U.S. 1240, 114 S.Ct. 2749, 129 L.Ed.2d 867 (1994).

The failure to dispute the facts relevant to the issue of absolute immunity are to be considered by the Court to be "admissions" under FRCP 56(e). *See, E.E.O.C. v. Wal-Mart Stores, Inc.*, 2001 WL 1725300 at *3 (Dist. Ct., W.D.N.Y. 2001); *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2nd Cir. 1992).

Once again, Coggins offered no evidence in opposition but for a deficient FRCP 56(f) affidavit. Nowhere in Coggins' Rule 56(f) affidavit did he state where, or from whom, Coggins hoped to obtain the necessary information to establish that Buonora was a complaining witness and, thus, subject to *Malley*. FRCP 56(f) requires "what facts are sought and how they are to be obtained...." The District Court abused its discretion in concluding that summary judgment was premature in light of the erroneous credit given to Coggins' defective Rule 56(f) affidavit. The District Court abused its discretion and erred in finding that the Respondent's Rule 56(f) affidavit "wholly complie[d] with the standard the Second Circuit has set forth...."

Denial of Petitioner's motion for summary judgment raised before the Circuit Court *de novo* the District Court's entire memorandum and decision. *De novo* review entails "study[ing] the reasoning on which [the District Court's decision] is based." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163 at 168 (2nd Cir. 2001). Since the District Court evaluated the Respondent's Complaint under 12(b)(6), this "reasoning" was squarely before the Second Circuit when reviewing the Petitioner's entitlement to absolute immunity *de novo*. *See*, *Walczyk*, 496 F.3d at 153; *Thomas v. Roach*, 165 F.3d at 142.

Petitioner is entitled to this absolute immunity since he was not a complaining witness in the prosecution of the respondent. His only role, other than assisting Officer Vara at the scene, was to testify, albeit falsely, before the grand jury. Therefore, petitioner is entitled to absolute immunity, both as a defense and from suit.

Respondent relies on *Mejia v City of New York*, 119 F.Supp.2d 232 (E.D.N.Y., 2000) in support of his claim that petitioner was a complaining witness, *Mejia* essentially holds, contrary to *Briscoe*, that no witness who testifies perjurously can be immune from civil liability. The court stated: "[O]ne who gives false information to a prosecutor that he knows will induce a prosecutor to... *continue proceedings* against a plaintiff, knowingly violates the law and is not entitled to *qualified* immunity for his actions." 119 F. Supp.2d 232, 273 (emphasis added). For better or worse, no witness testifies without some communication with a prosecutor. Therefore, according to *Mejia*, every witness who testifies is a

complaining witness and no witness can be immune from civil liability.

In support, the court in *Mejia* relied on *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123 (2nd Cir. 1997). However, the issue in *Ricciuti* was the fabrication of *non-testimonial* false evidence, not false testimony. The claim in the instant case involves false testimony, not the fabrication of non-testimonial evidence regarding which there is no issue that there is no immunity. In other words, the *Mejia* court radically applied the law in an irrelevant area to *Briscoe* immunity.

In the instant case, petitioner answered a fellow officer's call and then had no further involvement in the arrest until his grand jury testimony. He did not initiate respondent's prosecution.

The District Court's denial of summary judgment was completely inconsistent with the declaration in *Iqbal*, 129 S.Ct. at 1949-50 that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" *Id.*, 129 S.Ct. at 1950 (*quoting*, FRCP 8(a)(2)).

Finally, it would seem that a failure of the lower Courts to conclude that petitioner has failed to demonstrate that he is not a complaining witness would suggest that the very question of what constitutes a complaining witness, where petitioner has done nothing more than assist a colleague at the

scene of a crime and testify before a grand jury, albeit falsely, may itself be viewed as "compelling reasons" to grant this petition so that this Court may set forth a "bright line" beyond which neither the District Courts nor Circuit Courts may go.

Wherefore, this Petition should be granted pursuant to this Court's Rule 10(a) since there are "compelling reasons" for doing so grounded in the fact that the Second Circuit's creation of an "extra-judicial conspiracy exception" to *Briscoe v. LaHue* conflicts not only with this Court's holding but with the decisions of all Eight (8) Circuit Courts of Appeals which have considered this issue and have rejected the Second Circuit's holdings and rationale, together with such other and further relief as this court deems just and proper.

Respectfully Submitted

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